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A

**TREATISE**

ON THE

**PLEADINGS AND PRACTICE**

IN

**REAL ACTIONS;**

**With Precedents of Pleadings.**

---

By **CHARLES JACKSON.**

---

Quis denique adstrictis istis et compositissimis Actionum, Exceptionum, atque totius Judicii ordinandi peragendique formulis, multo celerius feliciusque, quam hodierna illa in foro garriendi licentia, terminatas esse lites non fateatur.

*Præfat. ad Brissonium, de Formulis.*

---

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.....

1828.

DISTRICT OF MASSACHUSETTS, TO WIT:

*District Clerk's Office.*

BE IT REMEMBERED, that on the twenty-fourth day of May, A. D. 1838, in the fifty-second year of the Independence of the United States of America, Charles Jackson, of the said district, has deposited in this Office the Title of a Book, the Right whereof he claims as Author, in the words following, to wit:

"A Treatise on the Pleadings and Practice in Real Actions; with Precedents of Pleadings. By Charles Jackson. Quis denique adstrictis istis et compositissimis Actionum, Exceptionum, atque totius Judici ordinandi peragendique formulis, multo ceteris felicisque, quam hodierna illa in foro garriendi licentia, terminatas esse lites non fateatur. Prefat. ad Brissonium, de Formulis."

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JNO. W. DAVIS,

*Clerk of the District of Massachusetts.*

## PREFACE.

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It is more than three centuries since the common real actions have been almost wholly disused in England; their place being supplied by the action of ejectment. The real actions have consequently for many years past attracted very little of the attention of the profession in that country; and the law concerning them is to be sought chiefly in some few ancient writers, and in the Year Books, and other early reports.

The action of ejectment has never been in common use in this part of our country; the writ of entry on disseisin being found a more convenient and effectual remedy, and being maintainable in every case in which ejectment would lie. When the claimant has lost his right of entry, so that he cannot maintain ejectment, his only remedy, in England as well as in this country, is by the appropriate real action. The only inconvenience that has attended the use of these real actions with us, has arisen from the want of some digest of this branch of the law, and of a manual of pleadings adapted to our jurisprudence, and modes of proceeding, which might guide the researches and abridge the labour of students and practitioners.

In an early stage of my professional life I experienced on several occasions the inconvenience arising from this circumstance, and began many years ago to

make collections for my own use from the ancient books on this subject. As the matter gradually accumulated on my hands, it was natural and convenient to digest it in a regular order ; and thus a large part of the following book had acquired its present shape, long before I had thought of ever making it publick.

On quitting the bench, I proposed to myself, if my health should be sufficiently restored, to resume at some future time this my favourite study ; and accordingly on my return from Europe was meditating a renewal of this undertaking ; when I found that the learned Professor of law in Harvard University was publishing a work on the same subject. This of course prevented any further prosecution of my purpose ; and for a long time I had abandoned all thought of making the additions necessary to prepare my book for publication. Afterwards, however, on comparing more particularly my compilation with the work of Professor Stearns, it appeared to me that the plans on which the two books were composed were so different that they would not much interfere with each other. Whilst his lays down and explains the principles and general rules of the law on this subject, mine enters more into the details, and gives the forms, which serve to illustrate those principles, and to show their practical application. In short, although if my book had not been nearly completed before his had been published, I should never have undertaken it ; yet I was induced, perhaps too easily, to believe that practitioners as well as students might still derive some advantage from the forms of pleadings, and the practical illustrations of the law, contained in the following sheets.

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About a year after the publication of Professor Stearns' book, a new work on the same subject, by Henry Roscoe, Esquire, was published in London. I had never seen nor heard of Mr. Roscoe's treatise, until my own was nearly half through the press. It seemed then too late to stop the publication of mine, unless it had been wholly superseded by the other; and from the cursory examination which is all that I have yet been able to bestow on Mr. Roscoe's work, it appeared to me that it still left room for a book devoted more particularly to practical forms and entries, and especially to such illustrations and applications of the ancient law as might serve to adapt it to the practice in this country.

In the progress of this work, my attention has been withdrawn from it, sometimes for more than a year at a time, and always for several months in different parts of every year. Whilst the delay thus produced may have given me opportunity to mature my thoughts on some particulars, this desultory course of study has more frequently perhaps tended to prevent a due attention to others; and I fear must have prevented that consistency and perspicuity which I might perhaps have attained in some degree by an uninterrupted application to the subject. One of the natural consequences of this course has been an occasional repetition of the same idea in different places. On revising the sheets for the press I have seen some such repetitions, which however I could not conveniently expunge without leaving the context imperfect or obscure. I shall consider myself fortunate if errors of an opposite and a worse kind, that is, antinomies and self-contradictions,

dictions, shall not be found to have arisen from the same cause. On the whole however I permit myself to hope that the book, with all its imperfections, will be of some use to the profession, and through them to the community ; and that even my errors may serve to point out a better course to some one who shall undertake a new digest of this branch of the law.

I have to add a few words as to some of the books referred to in the following pages, and to the manner of citing them. Lord Coke's Reports have been differently printed, sometimes with one, and sometimes with two pages for each leaf ; and they are accordingly cited differently by different writers. For example, Buckmere's case is cited as in 4 Co. 85, or 170, according to the edition referred to. It is not improbable that each of these modes of citation will be found in different parts of my treatise ; and I have to request the reader, when he does not find the point at the place indicated, to turn to the page which has double the number, or to that which has half the number, mentioned in the citation.

Fitzherbert's *Natura Brevium* also has been printed with different numbers to the pages ; and I was unfortunate enough, during all the early part of my studies, to use a modern edition, and to make my citations accordingly. The original paging is that by which this book is commonly cited ; and it ought to be adopted in every work intended for publick use. Accordingly, after I began to think of publishing these sheets, I engaged a young friend, who had borrowed the manuscript, to alter all the citations from Fitzherbert, so as to answer to the pages of the original edition. I have had occa-

sion to revise the greater part of these citations in preparing the sheets for the press; and as I did not find a single error in all that I examined, I have ventured to rely with confidence on the correctness of the whole. It may be added that the number of the pages in the original edition is 271, and in the other edition, 606; so that if any error should still exist in this particular, the true page may always be found, very nearly, by an easy computation.

There are also different modes of numbering the pages in two editions of the Year Book, which contains the first ten years of Edward 3. In one edition they are numbered progressively through the volume, making in the whole 542; and in the other, the cases of each year are separately paged, as in the other parts of the Year Books, beginning a new series of pages at the beginning of each year. The book is cited in each of these modes by different writers. I have endeavoured, for the convenience of the reader, to give both of the pages; but it will probably have been omitted in some instances; and when the point is not found in the page that is mentioned, the reader will readily find it by computing the page of the volume, or the page of the year, referred to, as the case may require (*a*).

(*a*) For example the second year begins at page 28, and ends at page 64. If therefore the reader is using the edition first mentioned, in which the pages are numbered progressively through the volume, and finds a citation of 2 E. 3. 26, or any other page under 27, he will know that the other edition is referred to, and he will find the page by adding 27 to the number in the citation. So the whole number of pages in the second year being 37, if the citation is of 2 E. 3. 38, or any other page over 37, the reader will know that the citation is made from the first mentioned edition, and will find the page in the other



In the third chapter, containing pleas in abatement, I have followed the order of Comyns' Digest under the same title. Having mentioned this circumstance in the beginning of that chapter, I did not think it necessary to repeat in every section the reference to the corresponding letter and number in Comyns; but considered his collection of cases as tacitly referred to under every different plea in the chapter. Indeed throughout the work I may be considered as referring in like manner to the Abridgments of Comyns and of Viner; although I have cited them only when there seemed to be some particular occasion for it. The student who wishes to pursue his researches on this subject, will of course examine the cases, under the appropriate titles, in those and the other abridgments of the ancient law. He will there find indeed numerous apparent contradictions. Many of these have been reconciled by the learning and sagacity of Lord Coke, in different parts of his invaluable writings; in other cases the reader will be governed by the later, or the more weighty authority; and when all other means of deciding between conflicting cases shall fail him, he must resort to the settled principles of justice and of common sense; which, as they constitute the basis, so they are the best expounders and interpreters, of the common law.

edition by subtracting 27 from the number of the page as cited. As to the pages of the second year, between 27, and 37, it cannot be known which edition is referred to, and the reader, if disappointed in the one, must resort to the other; but this difficulty cannot occur in any year after the second.

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A

**TREATISE**

ON

**REAL ACTIONS.**

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**CHAPTER I.**

*Of Real Actions in General.*

**A** REAL action is one that is brought to recover the freehold in lands, tenements, or hereditaments, claimed either in fee-simple, fee-tail, or for life, by one who is deforced, against him who is tenant thereof. The former is called the Demandant, and the latter the Tenant.

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**I.**

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In case of Ouster, or dispossession of the freehold, the law has provided remedies for the injured party, varying according to the nature of his title and estate, and the manner of the ouster. The first and most simple remedy is an entry by the claimant; which, when lawfully made, puts him into possession of the estate which he claims, as fully as if he had recovered the possession by a real action. This right of entry is limited by our statute 1786, c. 13, to twenty years next after the right or title first descended or accrued; with the usual savings in favour of minors and others, who are allowed ten years more after the expiration of the first twenty years.

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This right of entry to revest an estate, of which the claimant, or his ancestor, or predecessor, has been unlawfully deprived, is different in some respects from the right or title of entry for a forfeiture on breach of a condition; and also from an entry to perfect a title, or to vest an estate, as after a devise or other conveyance. In the latter cases the entry is essential to the title of the claimant; and if not made within the time prescribed by the statute, the party is wholly without remedy. But in the other case, the entry is merely allowed by the law as one of the remedies by which the injured party may regain the possession; and if he has lost the right of entry by lapse of time or any other cause, or if he chooses to waive it, the law provides various actions adapted to the nature of his case; which actions constitute the subject of this treatise.

These actions are founded either on the right of possession, or on the right of property; and a final judgment in either is conclusive as to the right on which it is founded. And as the right of property includes within it the right of possession also, a final judgment in a writ of right is conclusive as to the right of possession, and every other right or interest which the adverse party may have claimed in the premises.

Of the possessory actions we have adopted into our law in Massachusetts only the writs of entry. The Assises of *Novel disseisin* and of *Mortdancestor* (a) are in point of form incompatible with our practice; and they are also wholly unnecessary. For the first, we make use of the writ of entry in nature of an assise, and for the latter, the writ on abatement, or on disseisin *cum titulo*; and the proceedings in these writs of entry are as simple and expeditious as they would be in the assises. These writs of entry on abatement, and on disseisin *cum titulo*, also supply the place of the writs of *Ayel*, *Besayel* and *Cousinage*; and the three latter are not in use with us.

(a) The reader will find, in the Appendix, forms of these writs, and of some other ancient writs and entries, in real actions; which, though now obsolete and out of use in this State, may conduce to a better and more perfect understanding of the law relating to these actions which are retained in our practice.

In these three last mentioned actions it is averred that the ancestor was seised on the day of his death, and this is a material averment which may be traversed; but the writ of entry on disseisin *cum titulo* will lie on the disseisin of an ancestor at any time within the period of limitation; and on the other hand, if the ancestor died seised, the writ of entry on abatement is an adequate and appropriate remedy. The only other difference between the writs of *Ayel*, *Besayel* and *Cousinage*, and the corresponding writs of entry is, that the three former do not state the manner of the tenant's entry, but only state the seisin of the ancestor as the foundation of the demandant's title.

The writs of entry are of a great variety of forms, adapted to the title and estate of the demandant, and to the kind of deforcement of which he complains; and so complete and perfect is the ancient collection of these writs, that there has been but one instance of a new writ of entry made in pursuance of the authority given for that purpose by the stat. Westm. 2. c. 24 (b). As the writs of entry are calculated to disprove the title of the tenant by showing its unlawful commencement, the first and most obvious division or classification of them may be made with reference to the manner in which the tenant, or the person under whom he claims, first entered, or acquired the possession of the premises. That entry may be tortious, as in the case of Disseisin, Abatement, or Intrusion; or it may be without any wrong or trespass, as when it is in virtue of a conveyance from the person in possession. In the latter case, although the title of the grantee may be defeasible, yet he is not liable to an action of trespass for the entry (c).

(b) The writ of entry "*In Consimili casu*." After lands were made devisable, a writ might have been framed under this statute for a devisee. Perhaps it is now too late for the courts to introduce such a writ; but it may be worthy of the attention of the legislature.

(c) 8 Co. 86. *Buckmere's case*. Finch, L. 264, includes among the writs founded on a wrong, two cases of discontinuance, viz. by



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If the entry is made upon the lawful owner, and he is thereby ousted, it is a *disseisin*, and gives its name to the writ which is provided for that case. In this writ of entry on disseisin, the only title to the land which the demandant sets forth is the actual seisin of himself, or of some ancestor or predecessor under whom he claims. This title is founded on the simple principle, that a person in possession of land may lawfully retain it against all others who cannot show a better right to it. When therefore the demandant has shown the seisin in himself or his ancestor, he has a right to call on the adverse party to show how he was authorized to oust the former possessor, and by what title he now claims the land (*d*). This same title is relied upon in the writ of right, and in the writs of entry on abatement and intrusion; and indeed it is in some measure the basis of most of the other real actions. In all the writs of entry the demandant goes back to an actual seisin, in himself, or in some one under whom he claims; and although there are frequently other facts stated in the declaration which are essential to the maintenance of the action, yet in all of them this seisin is a material fact which may directly or indirectly be put in issue. Thus in the writ of entry *ad communem legem*, if the demandant or his ancestor were never seized of the land, he could not have granted the supposed estate for life; or the land could not have been held of him as tenant by the curtesy, or in dower. And the same remark applies to the writs *in casu proviso*, *in consimili casu*, and *ad terminum qui præterit*. So the writs of *cui in vita*, and *cui ante divortium*, could not be maintained, if the wife had never been seised of the demanded premises: and in the writs of *sine assensu parochiæ*, of *dum fuit infra ætatem*, and *dum non fuit compos mentis*, the defective conveyance supposed in the writ could

a husband of the lands of his wife, and by a bishop, &c. of the lands of his church, without the assent of the chapter. The difference is not material; but it seems better to consider those only as founded on a wrong, where the original entry was tortious.

(*d*) 5 Mass. Rep. 236.

not have been made, if the respective grantors had never been seised of the land (e).

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The disseisin may have been committed by the tenant himself, or by some one under whom he claims, and the writ will be varied accordingly. Hence it will be *in the quibus*, in the *per*, in the *per and cui*, or in the *post*, as the tenant is more or less nearly connected with the original wrong-doer.

Again, the disseisin may have been committed on the demandant himself, or on some one under whom he claims; and this gives rise to a further division of these writs. If committed on himself, the demandant simply alleges his own seisin and expulsion. If committed on an ancestor or predecessor, the writ is said to be *cum titulo*; because the demandant, in addition to *the title to the land*, on which the action is founded, must show that he is the heir or successor of the person disseised, which is his *title to the action*. This last rule is founded on the same principle that is mentioned above, to wit, that a person in possession, however defective his title, shall not be dispossessed by one who has not a better right. Suppose, for example, that the present tenant holds under a disseisin committed on A. B.; yet none but A. B. or his heirs can oust the tenant, or maintain any action against him for the recovery of the land.

We may trace to the same source another rule applicable to real actions, that neither party shall show a title in a third person unless he claims under it; or, in other words, that each party must rely on the strength of his own title, and shall not prevail, merely by showing that a stranger has a better right than that of his adversary. This latter rule however does not prevent the tenant in a writ of entry from disproving the seisin alleged in the writ, by proving that a stranger was seised during the period in question; neither does it prevent him from pleading, in the writ of entry *cum titulo*, that some other per-

(e) For a particular description of the above mentioned actions, the reader is referred to the appropriate titles in the following chapters.

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son is the heir of the supposed disseisee, and that so the demandant has no right to maintain the action as heir. In the two latter cases, the tenant is not merely attempting to show that the demandant's title is not so good as the stranger's; but he is directly disproving the title on which the demandant relies for maintaining the action; and if he does that successfully, it is obviously the same in effect as if the demandant had produced no evidence to maintain his title as set forth in his writ; in which case the tenant would be entitled to insist on a verdict or a nonsuit, without exhibiting any evidence of title on his part.

If the entry complained of is made on a vacant possession, after the death of an ancestor and before the entry of the heir, the writ must be founded on this *abatement*. This action is governed by the same general principles as the preceding, and is varied in like manner, according to the title and estate of the demandant, and of the tenant respectively; excepting only that this must of course be always founded on the seisin of an ancestor.

If the entry is made after the determination of an estate for life, and before the entry of him in remainder or reversion, this is an *intrusion*, for which the writ of that name is the appropriate remedy. This action also resembles the writ on disseisin, so far as it respects the title of the demandant or of his ancestor, and the manner of the tenant's entry. The count in this action however contains an additional fact, which is material, and must be truly and correctly set forth; and that is, the estate of the tenant in dower, by the curtesy, or for life. If there were no such particular estate, there could not have been such a reversion or remainder as that which is claimed by the demandant.

In all the remaining writs of entry, the original entry under which the tenant is supposed to hold, is effected without any trespass, or any ouster of the person in possession. Thus when a tenant in dower, by the curtesy, or for life, alienes in fee, in tail, or for the life of another, the alienee enters lawfully on the granted premises, although he holds them by a defeasible title. Such an alienation is a forfeiture of the particular estate, and the

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reversioner or remainder-man may recover the land, after the death of the alienor, by the writ *ad communem legem*; or, during his life time, by the writ *in casu proviso*, or *in consimili casu*.

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In these three last mentioned writs, and in all the others which are founded on a demise, the original entry for which the action is brought being lawful, though under a defective title, it is generally stated to have been by (*per*) the grantor; and after one other alienation the writ is in the *per and cui*; so that one of the degrees is lost; and if there has been *more than one tenant* after him who made the first entry, the claimant is driven to his writ of right, or writ of entry in the post; whereas in the writs on disseisin, abatement and intrusion, the entry of the *second* tenant is stated to be *by the first*, who held under the defective title; and the *third* makes the writ to be in the *per and cui*; so that the claimant is not driven to his writ in the post, or writ of right, unless there are *more than two tenants* after the first. This difference between these, and the writs on disseisin, abatement and intrusion, may at first view appear to have taken place merely in consequence of the technical form of stating the entry; but on examination it will appear to be founded on a substantial and sufficient reason. In these cases there is what is equivalent to three lawful alienations before the claimant is driven to his writ of right, or writ of entry in the post; and there are no more than three such alienations where the original entry was tortious. A person in possession under a lease for life, or as tenant in dower or by the curtesy, has a title and estate which is certainly not less respected in the law than that of a disseisor; and the wrong which he commits in undertaking to dispose of the fee is perhaps not greater than that of him who undertakes to convey land which he has acquired by disseisin. This reason applies with still more force to the writs, *dum fuit infra etatem*, and *dum non fuit compos mentis*, inasmuch as the infant, or insane person, cannot be considered in any sense a wrong-doer; and their grantee enters by force of a conveyance, which though defeasible for want of capacity in the grantor, is

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apparently lawful and good (*f*). So in the case of a grant by a disseisor, abator, or intruder, or by a tenant for life, the grantee enters under a conveyance apparently lawful and good, but unavailable on account of the defective title of the grantor. There is therefore no reason why a conveyance in fee by a tenant for life should not have as much effect as a like conveyance by a disseisor. In each case the grantor has the actual possession, claiming the fee simple; and the grantee may on proper inquiry learn the nature of his title and estate, equally well in both cases. The conveyances do not indeed in either case make a good title to the land, but they furnish perhaps as strong a presumption in favour of the grantee in one case as in the other.

If a tenant for years, or a tenant for the life of another, or the assignee of either of them, holds over after the expiration of the term, the remedy is by the writ of entry *ad terminum qui præterit*.

If a husband conveys the land of his wife, she may recover it after his death, or after a divorce *a vinculo*, by the writ of *Cui in vita*, or *Cui ante divortium*; and if she dies without having recovered it, her heir may maintain the writ of *Sur cui in vita*, or *Sur cui ante divortium*.

So if the minister of a parish undertakes to convey the parsonage land without the consent of his parish, his successor may recover it by the writ of *Sine assensu parochiæ*.

In all the preceding cases, of entry (*g*) under or by virtue of a conveyance, the grantor is supposed to claim, or to undertake to convey, an estate greater than he was entitled to. In the two succeeding cases, which are also founded on conveyances, lawful in point of form, but insufficient and defeasible, the grantor is supposed to have had a sufficient estate, but to have been incapable of making any valid conveyance of it. This happens, first, when he is under the age of twenty-one years, in which

(*f*) See 2 Inst. 153, 154.

(*g*) That is the original entry, stated in the writ as the foundation of the tenant's title.

case he, or his heir, may recover the land by the writ of *Dum fuit infra ætatem* ; and secondly, when he is not of sound mind, in which case the remedy is by the writ of *Dum non fuit compos mentis*.

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The writ, *Causa matrimonii prælocuti*, has not been adopted in our law, and probably would not now be maintainable in the English courts.

In all the cases above mentioned, of a conveyance of a greater estate than the grantor was entitled to, where the conveyance operated as a discontinuance, it took away the right of entry, and the claimant had no remedy but by the action adapted to his case. But this discontinuance is now prevented by the operation of divers statutes, and the claimant is not driven to his action, unless when by his own laches or other circumstances he has lost his right of entry.

The writs of entry being thus accurately adapted to the cases for which they were respectively designed, did generally present in a brief, but clear and precise form, the gist of the action, or point on which it was founded ; and of course the tenant was generally enabled, by a short and simple plea, to put in issue the title to the land in dispute. The consequence is that we find very few special pleas in bar in real actions, and a great variety of pleas to the writ, and to the action of the writ. If the action was misconceived, the tenant in many instances could not safely traverse the title as stated in the writ, by pleading the general issue ; because that might present some title under which he did not claim, and exclude the consideration of that on which he relied. As for example, if it is stated in the writ that he has no entry but by A. who disseised the demandant ; if he pleads that A. did not disseise, he must be prepared to prove a right of entry in A. But suppose that A. never had, nor claimed, any right to the land, and that B. had a right of entry, and that it was he who entered and demised to the tenant ; the latter cannot avail himself of this ground of defence under the general issue, nor under any other

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plea in bar to the present action (*h*) ; he must therefore plead this mistake in the writ, and cause it to be abated, or amended, before he can put in issue the title of B. by which he holds the land. He cannot in any such case set forth in a special plea the title on which he relies ; because it is an established rule that he shall plead nothing in bar, that is contrary to the supposal of the writ. If, for example, the demandant declares on the seisin of his uncle, and an immediate descent to himself, when in truth that uncle had a son who survived him, and conveyed or released to the tenant ; the latter cannot plead this conveyance or release in bar, because if the demandant should take issue upon it, he would virtually confess that the uncle had such a son, and of course that the writ was abateable in not having mentioned the son, or traced the descent through him. The tenant therefore must first plead *darrein seisin* in that son, if he was seised after the death of the uncle ; and if not, he must plead the mistake of the descent to the demandant by the omission of the son, and when the writ is put right in that particular, the tenant may plead the conveyance or release. So if the writ is within the degrees, and there is an omission of any one, by, from, or under, whom the tenant holds, he could not vouch the person so omitted, because it would be contrary to the supposal of the writ ; he might therefore lose the benefit of the warranty if he were compellable to answer to the writ in that form.

It appears therefore that many of these ancient pleas to the writ, or to the action of the writ, are absolutely necessary to the just defence of the tenant, and constitute in effect a perfect bar to the action. Several of them have accordingly been allowed in modern times to be pleaded as pleas in bar ; and we may expect that all the others which are of the same description will be allowed in like manner (*i*). This would not be to change

(*h*) That is, as those pleas were considered in ancient times. Most, if not all, of the pleas to the action of the writ, would now be allowed as pleas in bar.

(*i*) See 11 Mass. Rep. 119.

the law, or to introduce new principles ; but to conform our *practice* to the existing *principles* of the law ; and when our statutes or usages have changed our forms in one particular, to make the necessary corresponding changes in others. The original writ is not sued out, nor the count filed in our practice, as it was at the common law ; and many of the ancient forms and proceedings connected with that circumstance are of course inapplicable or unnecessary here. These pleas, which were formerly classed under the general title of pleas in abatement, being thus frequently essential and material, will be found to occupy a large space in the following pages ; and it is hoped that even those which are not of the important character above mentioned, will yet repay the labour of the student, by giving him a more thorough and perfect view of the nature and requisites of the different actions. A like remark may be made as to the writs of entry ; a great part of which will very seldom come into use in our practice ; but some knowledge of them may be useful as tending to display the logical symmetry and accuracy of the system of real actions, and must conduce to a better understanding of those which are in more frequent use.

Many of the ancient writs of entry have fallen into disuse, not only because the kind of estates and conveyances which gave rise to them are less common than formerly, but also because their place is often supplied by the more simple action on the demandant's own seisin. Whenever the action was founded on a defective conveyance which by the common law produced a discontinuance, or when from any cause the right of entry was tolled, the demandant was driven to the action which was adapted to the nature of his estate and title, and to the manner of the deforcement. But such discontinuances are now almost, if not wholly, unknown in our law ; and if the claimant retains the right of entry, he may enter, and if resisted may maintain his action on his own seisin acquired by that entry, and allege a disseisin by the party in possession (*k*) ; in which action he will recover if he

(*k*) 4 Co. 11. Bevil's case.



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can prove a sufficient title, although it should be such as, without that entry, would have required a special writ and count. In such a case although the tenant should have entered under another person, and may even have held as lessee for years, still his re-entry on the present demandant makes him a disseisor at the election of the latter; and he cannot plead in abatement, either the manner of his first entry, or that he is not tenant of the freehold (*l*).

So when the demandant claims as a remote heir, and fears that he may make some mistake in tracing and stating the descent in the declaration, he may avoid that difficulty, if he has the right of entry, by entering, and bringing the action on his own seisin. In short, in every case in which the claimant might bring the common action of ejectment, as maintained in the English courts, he may enter, and maintain the writ of entry in nature of an assise. This writ of entry, as the suit is conducted in our courts, is much more simple, convenient and effectual, than the action of ejectment. The original writ and declaration are shorter and more simple than in the ejectment; and there is no inconvenient fiction to encumber the record, and no necessity for special pleadings on either side. The demandant cannot have any title to the freehold which may not be proved in maintenance of his action, provided it be accompanied by a right of entry; and the tenant, under the general issue, may prove in his defence any similar title on his part. The judgment is more effectual, because it settles conclusively the right of possession as between the parties; whereas the action of ejectment may be repeated indefinitely, as long as the parties choose (*m*).

(*l*) Co. Lit. 256. b. § 430. 296. b. n. 1. This is not like the case cited from 3 Lev. 35. in Co. Lit. 271. a. n. 1. because in that case there was an actual subsisting term; but in the case here supposed, the term for years granted by the disseisor is extinguished and determined by the entry of the disseisee.

(*m*) See 6 Co. Rep. 9. Ferrer's case, as to the inconveniences of the action of ejectment.

The process also, and all the proceedings, in this and all the other real actions in our practice, are short and simple, not embarrassed with any useless forms, nor exposed to any peculiar causes of delay. The form of the original writ in all the common civil actions is prescribed by our statute 1784, c. 28, and is in general the same in real, as in personal actions. This skeleton of a writ contains no intimation of the nature of the action; but merely requires the defendant or tenant to appear and answer to the plaintiff or demandant; leaving it to the latter to fill the blank in the writ with "a plea of land," or "a plea of debt," "of covenant broken," "of trespass," &c. according to the nature of his demand. This is followed by the count or declaration, the whole of which is inserted in the body of the writ before the writ is served. The nature of the action therefore is determined in every case by the declaration, which thus constitutes part of the original writ.

The writ is sued out and served as it is in personal actions; excepting that if the tenant is arrested, his own bond, without any surety, is taken for his appearance (n). The tenant is required to appear at the first term; and he is not entitled to any peculiar indulgence or delay in the progress of the suit. The courts may in their discretion allow him a continuance at the first term, and they frequently do so, when it appears necessary, to enable him to investigate his title and prepare for his defence; but this is not demandable as a matter of right. There is therefore in our practice no *Attachment* after the summons, or service of the original writ; but if the tenant neglects to appear upon such a service, he is defaulted, and the declaration contained in the original writ is thereupon taken and deemed to be true, and the demandant has judgment accordingly (o). There is of course no *Distress*, *Grand cape*, *Saver default*, *Essoin*, nor *Petit cape*.

The premises demanded must be described in the count with as much precision as in any common conveyance or

(n) Stat. 1795, c. 75.

(o) Stat. 1784, c. 28.

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assurance of land. The tenant therefore may always know what land is claimed, and is never entitled to demand a *View*. The court may, on the motion of either party, order a view by the jury, when it appears necessary to a just decision of the cause (*p*); but this is not demandable of right; and when granted, it is had after the jury is empannelled. The purpose of this view is to enable the jury the better to understand the evidence respecting the monuments, lines and boundaries, of the land, and they return immediately into court to hear and determine the cause; so that the view does not delay the final judgment in the action.

*Voucher* is allowed here; but it is only for the purpose of giving to the warrantor formal notice of the action which is pending against the tenant, so as to enable the warrantor to furnish or suggest any means of defence to the action, if he is apprized of any that may not be known to the tenant, or not within his power. It is considered also as making him so far a party or privy to the action, that he is concluded by the final judgment, if it is against the tenant; and that in a subsequent action against him on his covenants of warranty, he will be estopped to deny the title by which the tenant was evicted. We have never proceeded in this State to render a judgment for the tenant to recover over in value against the vouchee; excepting indeed in the case of common recoveries, which are considered here, as they are in England, merely as conveyances and assurances, and in which we follow the forms of the common law. In other cases the vouchee does not formally enter into the warranty, nor does the demandant count against him. Of course there is no *Counterplea of the voucher*, as it is indifferent to the demandant whether it is rightly made or not. There is also no *Counterplea of the warranty*; because if the vouchee is not bound to warrant the land, he cannot be prejudiced by the voucher, but may show his defence when sued on his supposed covenants of warranty.

From this view of our practice it is obvious, that the

(*p*) Stat. 1807, c. 140.

writ of entry in nature of an assise is preferable here to the action of ejectment, in all the particulars in which the latter is thought to have the preference in England. And it has also the peculiar advantage above mentioned of being final and conclusive upon the parties as to the right that is tried.

Although these and other changes introduced by our law in the process and course of proceedings in real actions may appear to be numerous and important, yet on examination they will be found not to affect materially the principles on which the several actions are to be maintained or defended. In adopting the system from the common law, we have extracted and retained the substance of the different writs and pleadings, and all that is essential in the law relating to them, making no alterations even in the forms, excepting in some particulars where the change was required by the general course of our legal process, and the system of our jurisprudence.

If the demandant has lost the right of possession by a judgment against him in a possessory action, or otherwise, or if from the nature of his title and estate he cannot maintain a writ of entry, his only remaining remedy is a Writ of right, or some of the actions of the like nature. The writ of right lies only to recover lands in fee-simple; and it lies concurrently with all the writs of entry in which a fee-simple is demanded. When the demandant claims a fee-simple, in remainder after an estate tail, his only remedy is a Formedon; and if he claims the like estate as reversioner, his most appropriate remedy is a Formedon, though perhaps he might also have a writ of right.

The writ of right is founded on the seisin of the demandant, or of some ancestor of his; and in the latter case the demandant must trace the descent to himself, and show with exactness how he is heir to the person on whose seisin he counts. There are some few grounds of defence to this action which *require* a special plea, and a few others which *may* be pleaded specially; but in general every defence to the gist or merits of the action may be shown in evidence under the general issue, when

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coupled, as it always may be, with a traverse of the seisin set forth in the count. The judgment is absolutely conclusive as to every kind of right or interest that could be claimed in the land ; and the party prevailing will hold it " to him and his heirs, quit of the adverse party and his heirs for ever."

The writ in this action, as in all the others, is sued out of the Clerk's office, and returnable into the Court of Common Pleas, where the action may be tried ; and of course there is no variety and complexity of writs and processes, as there is in the English practice, in commencing the action and getting it into the proper court for trial.

There are in the common law several writs of right, and actions in the nature of writs of right, which are not in use with us. The *Præcipe in capite*, and the writs of right of *Advowson*, and of right for lands in *ancient demesne*, and the writ of *Juris utrum*, are provided for titles and estates which have no existence here. The writ *de rationabili parte* has never been introduced into our practice. If one coparcener or co-heir should occupy and claim the whole estate that descended from the common ancestor, the other may enter, and maintain a writ of entry on his own seisin ; or if his right of entry is tolled, he may maintain a writ of entry on abatement ; and if he has lost this remedy also, he may maintain a common writ of right on the seisin of the ancestor. The writ of right of *Dower* seems never to have been adopted here ; and it is wholly unnecessary, since the writ *unde nihil habet*, prescribed by our statute 1783, c. 40, may be maintained notwithstanding any assignment of dower in other parts of the husband's estate. Of all the remaining actions of this description, which are enumerated in Com. Dig. tit. Action D. 2, we have adopted only the Formedons, and the writ of *Dower unde nihil habet*. The writ of *Quod permittat*, when brought to remove a nuisance, would be as useful and as applicable here as in England ; but it has never been adopted, and our only remedy for a private nuisance is an action on the case. It may perhaps be worthy of the consideration of the legislature, whether they should not authorize some process like this *Quod*

*permittat*, or the *Assise of nuisance*, by which the party injured might cause the nuisance to be abated.

The action of Formedon is of three kinds, in descender, remainder and reverter. When a tenant in tail alienes in fee, in tail, or for the life of another, or when he is disseised or deforced, his heir after his death may recover the land by a writ of *Formedon in descender*. In this action the demandant must allege an actual seisin in the donee, by taking the profits, and must trace the descent accurately to himself, from the first donee, and from the tenant who was last seised by force of the entail.

When the gift is made to one in tail, remainder to another in tail or in fee; or to one for life, remainder to another in tail; and after the determination of the first estate the remainder-man, or his heir, is in any manner deforced, his remedy is the writ of *Formedon in remainder*. It is said also that when the gift is to one for life, remainder to another in fee, the remainder-man if deforced may maintain this action (*q*). The writ of Formedon seems however to be wholly unnecessary in such a case, because he who claims the remainder in fee after an estate for life has other adequate and appropriate remedies for every species of deforcement to which he may be subjected. If the tenant for life alienes and dies, the remainder-man may maintain a writ of entry *ad communem legem* (*r*), or a writ *ad terminum qui præterit* (*s*); and the latter action would lie also against any tenant *per auter vie*, who should hold over after the death of *cestuy que vie*. If the tenant for life alienes, and the action is brought in his life-time, it will be on the writ *in consimili casu* (*t*). And if the tenant for life dies seised, and a stranger intrudes, the remainder-man may recover the land by the writ of entry *on intrusion* (*u*). The writs of Formedon seem to be appropriate to cases in which the gift creates an estate tail, either in the first donee, or in a

(*q*) F. N. B. 217. 4 Mass. Rep. 64. 9 Mass. Rep. 501.

(*r*) F. N. B. 207. G.

(*s*) F. N. B. 201.

(*t*) F. N. B. 207. B. E.

(*u*) F. N. B. 204. D.

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remainder-man ; and if the point were of sufficient importance, it might perhaps still be made a question whether this action would lie in any other case. I have found only one instance in which a formedon is said to have been brought by a remainder-man in fee, after an estate for life ; and that is in Fitz. Ab. tit. Formedon, 68, citing a case in 34 E. 3 ; which year is not printed in the year book. Fitz. N. B. 217. D. cites 24 E. 3. but I can find no case on this point in the whole of that year ; and this is probably intended for the same case before mentioned as of the 34 E. 3. The other cases cited in the notes to F. N. B. in the chapter of Formedon in Remainder, contain only opinions advanced in argument ; and there is not, I believe, any precedent of a writ or count of this kind in the Register, in Fitz. N. B. nor in the entries of Rastal, or Coke. Fitzherbert, in the place first above cited on this point (x), does not state it as a settled rule ; and in Bac. Abr. tit. Rem. and Rev. (vol. v. p. 833, ed. 1798,) which treatise is said to have been written by Lord Chief Baron Gilbert, it is said in a like case, that the books are not agreed whether a formedon will lie.

If the remainder has been once executed, that is, if the remainder-man, or his heir, has been lawfully seised by force of the gift, they cannot afterwards maintain a formedon in remainder. In such a case, if the tenant in possession is ousted, he may have a writ of entry on disseisin ; and if the heir in tail is deforced, his remedy is by a formedon in descender. In the formedon in remainder, the demandant must allege an actual seisin in the first donee, but is not required to allege it in the donor.

If lands are given in tail, and the donee or his heirs die without issue, the donor or his heirs may recover the land by the action of *Formedon in reverter*. In this action the demandant must allege an actual seisin both in the donor and in the donee ; and if he claims as heir, he must trace the descent accurately from the donor to himself. He is not required to trace the descent on the part of the donee, because he is a stranger to that pedigree ; and of

(x) N. B. 217.

course he need not name any one who was seised as issue of the donee, but may state merely that the donee died without issue. This averment means, not that the donee never had issue; but, that the donee is dead, and that there is not any of his issue now living (*y*).

The general issue in each of these three actions is a traverse of the supposed gift, which is a denial that there ever was such an estate tail; and the usual form of this traverse is, that the supposed donor did not give (*non dedit*) the tenements in the manner alleged. When the estate is created by a feoffment to uses, or by a devise, the tenant sometimes pleads *non feoffavit*, or *non devisavit*; which seem to have been considered of the same import, in case of a feoffment or devise, as *non dedit*, when the count sets forth a gift (*z*): but it has been decided in our courts that *non dedit* is the only proper general issue when the estate is created by devise; and that *non devisavit* puts in issue only the fact of the making of such a will, and the legal construction of the devise (*a*).

Our law respecting the right of dower is substantially the same as in England. If not duly set out by the heir, it may be assigned by the probate court of the county in which the husband's estate is to be settled; or by the courts of common law in the county where the land lies. Our statute 1783, c. 40, prescribes the form of the original writ, and of the execution. Nothing is said of the plaint or declaration, but from an expression contained in the form of execution it appears that the action intended by the legislature is *Dower unde nihil habet*. In this action the widow is entitled to damages, whether her husband died seised or not, if her dower is not set out within one month after she demands it; and this demand must

(*y*) 8 Co. 88.

(*z*) Co. Ent. 329. 333, 334. 340, 341. Clift's Ent. 361, and see Co. Ent. 338, where *non feoffavit*, in the text, is rendered *ne dona pas*, in the margin. See also Fitz. Briefs 324. Bro. General briefs and special declaration, 13, 14. 26. Id. Formedon 46. 49. 42 E. 3. 5, 6.

(*a*) 5 Mass. Rep. 438.



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be made of "the heir, or other person having the next immediate estate of freehold or inheritance" after the death of the husband. By a later statute (1816, c. 84,) when the husband dies seised, his widow is entitled to one third of the rents, incomes and profits, until the heirs set out her dower, or until it is assigned to her by the courts of common law or of probate, as above mentioned. This provision seems intended to enable the widow and heirs, when they find it mutually convenient, to occupy the estate together, or to receive their respective proportions of the rents, without making an actual partition of the land by metes and bounds (*b*).

The action of *Waste* is a mixt action, by which, if the Plaintiff prevails he recovers the place wasted, and treble damages. It lies against any tenant for life or years, by him who has the immediate remainder or reversion of the inheritance after the particular estate. I apprehend that we have adopted as our common law the provisions of the statute of Gloucester, c. 5, relating to this action; and that the general principles of our law on this subject are the same as those in England. There is indeed one anomalous provision in our statute of dower, (1783, c. 40,) which if construed literally would give an action of waste to one who has the reversion for life only, after an estate in dower. I am not aware that this clause in the statute has ever received a practical construction, or undergone any judicial examination.

Of real actions some are founded on a *title stated in the writ*, as Formedon, and Dower, and all those which are brought on the seisin of an ancestor or predecessor; and others are founded merely on a tort or deforcement, as the writs of right, or of entry, when brought on the demandant's own seisin (*c*). The most material difference between these two classes is, that in the latter the demandant may include in one writ divers parcels of land which have come to him by several titles, provided he is disseised or deforced of them all at once, and by the same person or persons; but he cannot bring one action for di-

(*b*) 3 Pick. Rep. 475.

(*c*) 8 Co. 86. Finch L. 263.

vers lands, when his title, as stated in the writ, is derived from several ancestors, or depends on several conveyances. For example, if my father and uncle, co-heirs in fee-simple, are disseised, I cannot have one writ of entry as heir to both, but must bring a separate action on the seisin of each. So if there are two gifts of different parcels of land, to A. for life, remainder to B. in tail, B. cannot have one formedon in remainder for both parcels (*d*). There is also another point of difference between these actions, which is, that when the title is stated in the writ, the tenant may traverse that title, and if he prevails on that issue he will be entitled to a verdict, however defective may be his own title to the land, because the result shows that the demandant has no right to inquire into the tenant's title (*e*). But in the actions founded on a tort or forcement to the demandant himself, his title to the land, and his right to bring the action, are the same, so that the tenant cannot traverse either of them alone. In this case, however, although on the general issue the tenant's title may come in question, yet he is not obliged to go into evidence on that point until the demandant has proved his seisin; which constitutes his title, both to the land and to the action; and if the demandant fails in that particular, the tenant will hold the land without showing any title on his part.

Again, some of these actions are adapted to reclaim an estate of which the demandant or his ancestor was once seised: and the effect of a judgment for the demandant is merely to restore to him that former estate; and in others, the demandant is claiming a new estate or interest in the land. Of the former class are the writs of right, and the writs of entry on disseisin, abatement, intrusion, and many others. Of the latter are the writs of formedon in remainder, and of dower, and all those which are founded on a forfeiture incurred on the part of the tenant, as the writs of entry *in casu proviso*, and *consimili casu*, and the writ of waste. In the three last mentioned cases it may often happen that the demandant, or his ancestor,

(*d*) 8 Co. 170, Buckmere's case.

(*e*) See 6 Mass. R. 239. 418.

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has been previously seised of *the land*, (which indeed must always be the case, unless when the demandant claims as remainder-man, or assignee of the reversion) but he is claiming *a new estate in the land*, to wit, for the residue of the term, to which he never was entitled until the forfeiture upon which his action is founded.

Real actions are further divided into those which are possessory, which class includes all the writs of entry; and those which are brought to recover the right of property. And some of each of these classes are founded on the seisin or right of an ancestor, and are called *ancestral*; and the others are founded on the seisin or right of the demandant himself (*f*). These distinctions sufficiently explain themselves, and do not seem to be of any practical importance.

Every real action must be brought against the tenant of the freehold (*g*); and of course *Non-tenure*, general or special, is always a good plea. This was formerly considered as a plea to the person merely, and was accordingly classed among the pleas in abatement; but in our practice it is allowed to be pleaded to the action; because, if proved, it shows conclusively that there is no cause of action against the tenant.

So likewise any other defence relating to the person of the demandant or the tenant, which might be known to the tenant as well before, as after, the count was filed, was generally in ancient times pleadable in abatement; but when it is of a kind to show that the action cannot be maintained by the present demandant against the present tenant, it may now be pleaded in bar. Such are the pleas of alienage of the demandant, and of the omission of any one who ought to have been joined as a demandant or tenant, or the joining of one who ought not to have been joined. In the latter class, however, there is one exception, where the reason of the rule does not apply, and where accordingly the plea, though true, did not necessarily abate the writ in ancient times, and would not now in any way defeat the action. This is, when two or more are sued as tenants, and one of them pleads sole-

(*f*) Finch L. 258.

(*g*) Finch L. 259. 6 Mass. R. 308.

tenancy, which is not denied by the other supposed co-tenants. In such a case the demandant may proceed in the action against him who has taken the tenancy upon himself, as if no other tenant had been named in the writ. The reason undoubtedly is, that if the present writ were abated on this plea, the demandant must bring another of the same kind, against the tenant who is now in court, and who avows himself to be the sole owner of the land, and is ready to defend it; and the present action may be prosecuted between these two parties without prejudice to any of the others who were named as tenants, and without any inconvenience or embarrassment as to the form of the proceedings. These principles as to the joinder of parties are for the most part the same in real, as in personal actions. Thus in an action of debt, or assumpsit, the omission of one who ought to have been joined as a plaintiff, or the joining of one who has no cause of action, is a fatal defect. This was formerly pleadable in abatement (*h*); but is now considered as a bar to the action; and when duly proved, it produces a nonsuit, or a verdict for the defendant. So the omission of one who ought to have been joined as a defendant, may always be pleaded in abatement; and the joinder of one who ought not to have been joined is sometimes matter of abatement, and sometimes a bar.

There were, in the ancient common law, several pleas to the count, and to the writ, which are not in use with us (*i*). The count in our practice being always inserted in the writ, and both of them being constantly before the court during the whole progress of the suit, every defect apparent in either may be taken advantage of by a special demurrer; and defects of the kind here referred to, must generally be apparent on the face of the writ and count.

The law having provided a suitable action for every species of ouster, and having furnished writs adapted to all the various circumstances of the parties, it was required, of course, that the demandant should make use of the writ and action provided for his case; and any material

(*h*) Com. Dig. Abatement E. 12.

(*i*) Id. G. and H. 1 to 16.

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departure from the forms prescribed was not only objectionable, as being irregular and unauthorized, but was often of such a kind as to produce serious injury or inconvenience to the tenant. It followed that the various pleas to the action of the writ, showing that the action was misconceived, or that the situation of either party was mis-stated, furnished frequently a material ground of defence, and a complete bar to the action. All pleas of this kind would no doubt be allowed in our practice as pleas in bar.

If the action was originally well conceived, and brought by and against the proper parties, it might be afterwards defeated by various circumstances; some of which wholly destroyed the cause of action, and others only showed that it could not be further prosecuted. Of the first kind was the death of the demandant, or, if he sued as a corporation sole, his resignation or removal; and of the other kind, was the death of one of the demandants, or of the tenant, or the coverture of the demandant, or of one of the demandants. Our law has been lately amended in this respect by the statute 1826, c. 70. By this act it is provided, that on the death of a sole demandant, or of one, out of two or more demandants, the heir of the deceased may be admitted to prosecute the suit, either alone, or jointly with the survivors, as the case may be; and in the latter case, if the heir does not seasonably apply to be admitted, the surviving demandant or demandants may prosecute the suit alone for their respective shares or portions. It is provided also, that in case of the death of any one out of two or more tenants, the action may be prosecuted against the survivor or survivors, for such part or portion as they hold or claim. The like provision is made also for the case of the marriage or other disability of the demandant, or of any one of them; so that if a woman demandant marries, pending the writ, her husband may be joined as demandant with her; or if a demandant becomes non compos, his guardian may be substituted to prosecute the suit for him. It is further provided, that in all the above cases the courts may allow such amendments of the declaration and pleadings, and such suggestions on the record, as the case may require.

## CHAPTER II,

*Writ of Entry on Disseisin.*

THIS writ is founded on an actual disseisin, committed by the Tenant, or by some person by or after whom the tenant entered on the land in question. The disseisin is of the Demandant himself; or of some ancestor or predecessor of the demandant, under whom he claims the land. The simplest form of the writ is that on a disseisin of the demandant by the tenant; in which case the writ and count may be as follows :

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Summon T. of ———, to answer to D. of ———, in a plea of land, wherein the said D. demands against the said T. a certain piece of land with the appurtenances, situate in B. in our said county of ———, containing about fifty acres, and bounded as follows, to wit, ———, of which the said T. unjustly and without judgment disseised the said D. within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past, he himself was seised of the tenements aforesaid with the appurtenances in his demesne as of fee and right, taking the profits thereof to the value of ten dollars by the year; and of which the said T. disseised him as aforesaid; to the damage of the said D. as he says, the sum of one hundred dollars.

1. Entry on demandant's own seisin, and disseisin by tenant.

If the action had been brought on a disseisin of a husband and wife, seised in her right, they would say,

——— to answer to D. of ———, and E. his wife, in a plea of land, wherein they demand in right of the said E. a certain piece of land, &c. of which the said T. unjustly, &c. disseised them, &c. And whereupon the said D. and E. say that within thirty years, &c. they were seised of the tenements aforesaid, with the appurtenances in their demesne as of fee in right of the said E. taking, &c.

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If the disseisin had been committed to E. before the marriage, they might say,

—of which the said T. unjustly, &c. disseised the said E. whilst she was sole and unmarried, within thirty years, &c. And whereupon the said D. and E. say that within thirty years, &c. she, the said E. was seised of the said tenements with the appurtenances in her demesne as of fee, taking the profits, &c. and afterwards she took to her husband the said D. (or, intermarried with the said D.) and of which said tenements with the appurtenances, the said T. disseised her as aforesaid; to the damage of the said D. and E. as they say, &c.

In the above forms, the tenant is summoned to answer to the demandant "*in a plea of land,*" &c. in conformity with our phraseology in all other civil actions. It would correspond more nearly with the English precedents to summon him to answer to the demandant "of a plea that he render to him a certain piece of land, with the appurtenances, situate," &c. The difference is not material; and the form here adopted seems to be in some measure required by our statute prescribing the forms of writs in civil actions (a).

In all writs of entry *cum titulo*, that is, when the demandant alleges a seisin in some ancestor or predecessor under whom he claims, the clause, "which he claims as his right and inheritance," is added after the description of the land. Fitzherbert, N. B. 191. C. D. inserts it also in the writ on the demandant's own seisin, when he claims an estate in fee-simple. But this is contrary to the general rule, as stated in the same book, 201. F. and in the Register 228; which rule applies to all the writs of entry excepting the *Cui in vita*; and when the demandant claims an estate for life, or in tail, the clause is not only unnecessary, but improper. I have therefore omitted it; although its insertion cannot vitiate the count when the demandant claims a fee-simple.

The words, "in a time of peace," which are always found in the English precedents, may no doubt be safely

(a) Stat. 1784, c. 28.

omitted, for the reasons given by Professor Stearns, *Real Actions*, 155. CHAP. II.

The *ad damnum* at the close of the writ is required in all cases, by our statute which prescribes the forms of writs; although no damages are recovered by our laws in this, nor in any other real action.

If the demandant were seised as a sole corporation, the count will vary accordingly. For the minister of a town, or parish, it would be as follows:

Summon T. to answer to D. of ———, clerk, and minister of the said town of B. (or, of the first parish in the said town of B.) in a plea of land wherein the said D. demands against the said T. a certain piece of land, &c. which he claims as the right of the said town (or, parish,) and of which the said T. unjustly, and without judgment, disseised the said D. within thirty years now last past, as it is said. And whereupon the said D. says, that within thirty years now last past, he himself was seised of the tenements aforesaid with the appurtenances in his demense as of fee in right of the said town (or, parish,) taking the profits thereof to the value of ten dollars by the year; and of which the said T. disseised him as aforesaid. 2. For the minister of a town or parish.

When the action is brought by a tenant in tail, or for life, on his own seisin, it is, I apprehend, unnecessary to set forth his estate specially. The actual seisin of the demandant at the time of the ouster is the only material fact in the writ and count; and every man who is unlawfully ousted of his freehold may maintain a writ of entry to recover the possession of it. If the demandant proves his seisin, and if the tenant cannot justify the entry under which he holds the land, it seems to no purpose for him to allege that the demandant has not fully and accurately described his title and estate. In the case supposed, the tenant, being a mere stranger, without any right of entry, or any title whatever, ought not to be permitted to oust the demandant, and then refuse to restore the possession until the demandant shall show how he originally acquired his title to the land, and what estate he claims in it.



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There seems, however, to be some confusion in the ancient books on this subject. By the rule in the Register, 228, the demandant, in a writ of entry on his own seisin, shall not set forth his title *in the writ* (b), excepting only in the writ of *Cui in vita*; and there is a case in 1 Leon. 231, to the same point. So in 33 H. 6. 14, it was decided that the demandant, who was a tenant in tail, in a writ of entry on his own seisin, should not set forth the estate tail *in his count*, but should declare "according to the ancient form, to wit, (that he was seised) as of freehold;" and it was added that this averment would consist with any estate of freehold in the demandant; and that there would be no repugnance, although it should afterwards appear that he held the land either in fee-simple, or in fee-tail (c). On the other hand it was held, in 21 H. 6. 26, that in such an action by a tenant in tail, or for life, it was proper to set forth his title and estate *in the writ*; and in the note to F. N. B. 191. E. it is said that it should be done both in the writ and count. In the books of entries there are precedents of counts of both kinds. In Co. Ent. 219, there is a count by a tenant in tail, in which he states merely that he was "seised in his demesne of freehold;" and in his replication to a plea in bar, he sets forth an estate tail which he traces to himself, and shows that he was seised accordingly at the time of the disseisin complained of. And in Rast. Ent. 272, there is a count in the same form, to wit, that the demandant was "seised in his demesne as of freehold;" and there is nothing in the subsequent pleadings to show whether he claimed an estate in fee-simple, fee-tail, or for life. In Rast. Ent. 271 and 277, there are counts by tenants in tail in which the demandant's title and estate are specially set forth.

It may here be remarked, that if the heir in tail, or the reversioner, or remainder-man, has never been lawfully

(b) And see Reg. 229.

(c) Fitz. Entre. 24. S. C. Dyer 101. F. N. B. 192. A.

seised, and is claiming the land by force of the gift in tail, he must bring a writ of Formedon, and set forth specially the original gift, and show how he is entitled under it; all which facts are material and traversable. But if he has been once lawfully seised by force of the gift, he cannot afterwards maintain a Formedon; and if he is ousted, his only remedy is an Assise, or a writ of entry, on his own seisin (*d*).

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If it should be determined that a tenant in tail, in a writ of entry on his own seisin, need not set forth his title and estate, the form may be as follows :

Summon T. to answer to D. in a plea of land, wherein he demands against the said T. a certain messuage, &c. of which the said T. unjustly and without judgment disseised the said D. within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past, he himself was seised of the messuage aforesaid with the appurtenances in his demesne as of freehold, taking the profits thereof, &c. and of which the said T. disseised him as aforesaid.

3. For a tenant in tail, or for life.

If this should appear to be a good and sufficient count for a tenant in tail, it would be good also in the like case for a tenant by the curtesy, tenant in dower, or for life.

If, however, the tenant in tail should be required, or should think it expedient, to set forth his title and estate specially, the former part of the count may be the same as in the preceding case, and it may then proceed as follows :

And whereupon the said D. says, that within thirty years now last past, he himself was seised of the tenements aforesaid with the appurtenances in his demesne as of fee-tail and of right, that is to

4. For a tenant in tail, specially.

say,

(*d*) F. N. B. 219. A. This principle is not controverted in the case of *Mosley v. Coldwell*, 1 Ld. Raym. 430. In that case the heir in tail is supposed by Treby, Chief Justice, to have entered, when his right of entry was tolled; so that he was never lawfully seised by virtue of the gift in tail. See also 7 Ed. 4. 19, the opinion of Danby, Chief Justice; which is extracted by Brooke, (*Formedon*, 47,) as the settled law in this case.

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say, to him and the heirs lawfully issuing of the body of him the said D. taking the profits thereof, &c. of the gift which one A. B. made of the tenements aforesaid with the appurtenances, to one E. F. and the heirs lawfully issuing of his body, from which said E. F. after his decease, the tenements aforesaid with the appurtenances, descended to the said D. as eldest son and heir of the said E. F. and of which the said T. disseised him the said D. as aforesaid (c).

It will be observed that the title and estate are not here set forth so fully and precisely as they are in a Formedon. The gift is not explicitly alleged, and there is no averment of the seisin of the first donee; and even the descent to the demandant is not traversable, as he demands the land by virtue of his own seisin, and not as heir. If it should be thought necessary to make the count still more full and particular in these respects, it may be readily formed from the precedents in Rast. Ent. 271 and 277.

The count, if it makes any mention of the estate-tail, will of course be varied, to correspond with the gift, and with the title of the demandant, that is to say, with the manner in which he claims to hold under the gift.

If the action is brought by a tenant for life, who has been disseised, and it is thought proper to set forth his title and estate specially, the count in the former part of it may be as in the first precedent; and he will set forth his estate as follows:

5. For a tenant for life.

And whereupon the said D. says, that within thirty years now last past, he himself was seised of the messuage aforesaid with the appurtenances in his demesne as of freehold, for the term of his life, taking the profits thereof to the value of fifty dollars by the year, [of the gift which one A. B. thereof made to him the said D. for his life;] and of which the said T. disseised him as aforesaid.

In Rastal's Entries, 272. b. the clause, "of the gift which one A. B." &c. above enclosed in brackets, is omitted. The count I suppose would be good without those words; and if so, the above form, omitting that clause,

(c) Rast. Ent. 271.

would serve for any tenant for life; whether he held by grant, or as tenant by the curtesy, or in dower. If, however, it should be thought best to set forth specially the estate of the demandant, that clause would be retained in the preceding case, and in the others the form would be varied as follows:

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*For a tenant by the Curtesy.*

And whereupon, &c. he himself was seised, &c. in his demesne as of freehold, for the term of his life, as tenant thereof by the curtesy (*f*), taking the profits, &c. and of which, &c.

6. For tenant by the curtesy.

*For a tenant in Dower.*

—in her demesne as of freehold, that is to say, for the term of her life as tenant thereof in dower, of the endowment of A. D. her late husband, taking the profits, &c. and of which, &c.

7. For tenant in dower.

For a tenant for the life of another, the form would be as follows:

—in his demesne as of freehold, that is to say, for the term of the life of one A. B. who is still in full life (*g*), taking the profits, &c. of the demise which the said A. B. (*or*, which one E. F.) thereof made to him the said D. for the life of the said A. B. and of which, &c.

8. For tenant for the life of another.

In all the preceding forms, the demandant himself is supposed to have been actually seised of the demanded premises, and the disseisin is alleged to have been committed on him. If the demandant was never seised, and claims the land by descent, or by succession, the writ of entry is said to be *cum titulo*; that is, besides stating the wrongful entry of the tenant or of the person under whom he holds, it sets forth specially the demandant's *title*, as heir, or successor, which authorizes him to maintain the action. The title thus disclosed is material and

(*f*) This is the phrase adopted in our statutes, instead of "tenant by the law of England." Stat. 1783, c. 36. and 1805, c. 90.

(*g*) Real actions being local, no venue is laid in any particular averment in the pleadings.

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traversable; because, although it be true that the tenant has disseised A. B. and has no just right to hold the land, yet no one but A. B. or his lawful heir, or successor, can call in question the title of the tenant, or require him to justify his entry. By the common law the writ of entry on disseisin *cum titulo* lies only, when the demandant claims an estate in fee-simple, of which his ancestor, or predecessor, was unjustly disseised. If he claims an estate tail, his only remedy upon the ouster, or discontinuance, of his ancestor, is a writ of Formedon. If the ancestor was seised for the life of another, the heir had no action to recover the land after the decease of the ancestor; and by the English statutes on this subject the residue of the estate in such a case is considered as a chattel interest (*h*). By our statute of descents (*i*) an estate for the life of another descends to the heirs in the same manner as a fee-simple; and it is presumed that the heirs would have the like remedy, in case of the ouster of their ancestor.

When the demandant claims a fee-simple, and counts on the seisin of his father, the writ and count may be as follows :

9. For an only child, on the seisin of his father.

Summon T. to answer to D. in a plea of land wherein he demands against the said T. a certain messuage with the appurtenances situate, &c. bounded, &c. which the said D. claims as his right and inheritance, and of which the said T. unjustly and without judgment disseised A. B. the father of the said D. whose heir he is, within thirty years (*k*) now last past, as it is said. And whereupon the said D. says that within thirty years now last past the said A. B. was seised of the messuage aforesaid with the appurtenances in his demesne as of fee and right, taking the profits thereof to the value of twenty dollars by the year; and from the said A. B. the right to the messuage aforesaid with the appurtenances descended to the said D. who now demands the same, as the only child and heir of the said A. B. and of which the said T. disseised the said A. B. as aforesaid.

(*h*) 20 Car. 2. c. 3. 14 Geo. 2. c. 20.

(*i*) 1805, c. 90.

(*k*) This is now the period of limitation for this action, by our statute 1807; c. 75.

If the father was seised for the life of another, the count may be the same, excepting the allegation of seisin in the father ; which may be as follows :

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—the said A. B. was seised of the tenements aforesaid with the appurtenances in his demesne as of freehold and right, that is to say for the term of the life of one G. K. who is still in full life, taking the profits, &c. of the demise which one L. M. thereof made to the said A. B. for the life of the said G. K. and from the said A. B. the right to the tenements aforesaid with the appurtenances for the life of the said G. K. descended to him the said D. who now demands the same as the only child, &c.

10. The like, when the father was seised for the life of another.

As real estates by our statute 1805, c. 90, descend to all the children in equal shares, it seems proper in cases like the preceding to state that the demandant is the only child. At the common law coparceners were required to join in every action founded on the seisin of their ancestor. By our statute 1785, c. 62, if there is more than one heir, they may all, or any two or more of them, join in a suit for the inheritance descended to them from the common ancestor ; or each one may sue separately for his own share : and the same rule is extended to joint-tenants. It has accordingly been decided that summons and severance does not lie for co-heirs or joint-tenants in our courts ; as they need not include any one as a demandant who is unwilling to prosecute the suit (1).

If the person who was disseised left several children, and the action is brought by one of them, the form may be varied, as follows :

—wherein he demands against the said T. one undivided third part of a certain piece of land, &c. which the said D. claims as his right and inheritance, and of which the said T. unjustly and without judgment disseised F. the father of the said D. whose heir he is, within thirty years now last past, as it is said. And whereupon he says that within thirty years now last past the said F. was seised of the whole of the above described tenements with the appurtenances in his demesne as of fee and right, taking the profits, &c. and from the said F. the right to the whole of the said tenements

11. The like, by one of several co-heirs.

(1) 10 Mass. Rep. 179.

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with the appurtenances descended to his three children and co-heirs, to wit, the right to one undivided third part thereof to B. one of the children and co-heirs of the said F. the right to one other undivided third part thereof to S. another of the children and co-heirs of the said F. and the right to the remaining undivided third part thereof to the said D. who now demands the same, as the other of the children and co-heirs of the said F. and of which, &c.

If the demandant counts on the seisin of a more remote ancestor, the form will be varied accordingly. If the disseisee were the grandfather of the demandant, he will say,

12. On the seisin of a grandfather.

—of which the said T. unjustly and without judgment disseised G. the grandfather of the said D. whose heir he is, within thirty years, &c. And whereupon the said D. says that within thirty years, &c. the said G. was seised, &c. and from the said G. the right, &c. descended to one F. as the only child and heir of the said G. and from the said F. the right, &c. descended to the said D. who now demands the same, as the only child and heir of the said F. and of which, &c.

If in the preceding case the father had died before the grandfather, the descent would be alleged immediately from the latter to the demandant ; as follows :

13. The like, on an immediate descent to the grandson.

—and from the said G. the right, &c. descended to the said D. as grandson and heir of the said G. that is to say, as the only child of one F. who was the only child of the said G. and of which, &c.

In this case F. is called the child, but not the heir, of G. because he died in the lifetime of G. So the demandant is called the child, but not the heir, of F. because F. never had any estate or right in the land. F. is named only for the purpose of tracing the pedigree of the demandant and showing how he is the heir of G. the person last seised (*m*).

(*m*) See 3 Bos. and Pul. 453, that in general in tracing a descent, whenever some person necessarily intervenes between the ancestor and the heir, as the father between grandfather and grandson, or the father of a nephew between him and his uncle, that person must be mentioned, although the descent is immediate from the

If the disseisee were the uncle of the demandant, he will say,

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—of which the said T. unjustly, &c. disseised N. the cousin of the said D. whose heir he is, within, &c. And whereupon, &c. and from the said N. for that he died without any heir of his body lawfully issuing, the right, &c. descended to the said D. who now demands the same, as cousin and heir of the said N. that is to say as the only child of one B. who was the brother of the said N. and of which, &c.

14. For a nephew, on the seisin of his uncle.

If in the preceding case B. had survived N. so that the right had vested in him, he would be named in the writ as brother and heir; and the descent would be alleged from N. to B. and from B. to D. as in the 12th precedent.

The word cousin, *consanguineus*, may be applied in pleading to any relations of ancestor and heir, unless when the ancestor is father, grandfather, or great-grandfather (n).

The real estate of a person deceased intestate is now by our laws divided equally among all his children; but by the laws in force before the first day of January 1790, the eldest son was entitled to a double portion of his father's estate. In order to show how this circumstance is noticed in pleading, as also how to trace the genealogy through many different ancestors, I propose the following case; although by our late Statute of Limitations the writ of entry would be barred on a disseisin of a time so remote as is here supposed.

A. B. was disseised in his lifetime, and died in the year 1789, leaving Daniel, his eldest son, and two other children, William and Elizabeth. Daniel died in 1791, leaving two children, Daniel and Mary, who are both now living. Elizabeth died in 1795, without issue. William died in 1800, leaving two children, William and Susan, who are both now living. Daniel, the son of Daniel, and

grandfather to the grandson, or from the uncle to the nephew; but this rule does not extend to a descent from brother to brother. 12 Mod. 619. Vin. Ab. Heir (L.)

(n) Thel. Dig. L. 9. c. 5. § 17. 28.



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Susan, the daughter of William, join in a writ of entry on the seisin of their grandfather. The writ and count would be as follows :

15. For two grandchildren through different fathers.

Summon T. to answer to Daniel B. and Susan B. in a plea of land, wherein they demand against the said T. eight undivided sixteenth parts of a certain piece of land, &c. which they claim as their right and inheritance, to wit the said Daniel five undivided sixteenth parts thereof, and the said Susan three undivided sixteenth parts thereof, and of which the said T. unjustly, &c. disseised A. B. the grandfather of the said D. and S. whose co-heirs they are, within thirty years now last past, as it is said. And whereupon the said D. and S. say that within thirty years now last past the said A. was seised of the whole of the above described tenements with the appurtenances in his demesne as of fee, taking the profits, &c. and from the said A. the right to the whole of the said tenements with the appurtenances descended to his three children and co-heirs, to wit, the right to eight undivided sixteenth parts thereof, by the laws then in force, to Daniel B. the eldest son and one of the co-heirs of the said A. B. and the right to four undivided sixteenth parts thereof to each of the other two children and co-heirs of the said A. B. to wit, Wm. B. and Elizabeth B. and from the said Daniel B. the son, the right to his said eight undivided sixteenth parts of the same tenements with the appurtenances descended to his two children and co-heirs, to wit, the right to four of the said sixteenth parts to the said Daniel, one of the now demandants, as one of the children and co-heirs of the said Daniel the son, and the right to the other four of the said last mentioned sixteenth parts to one Mary B. the other of the children and co-heirs of the said Daniel the son : And from the said Elizabeth, for that she died without any heir of her body lawfully issuing, the right to her said four undivided sixteenth parts of the above described tenements with the appurtenances descended to her said brother William, and to the said two children of her said brother Daniel, as co-heirs of the said Elizabeth ; to wit, the right to two of her said sixteenth parts to the said William, and the right to one of the same sixteenth parts to the said Daniel one of the now demandants, and the right to the other of the same sixteenth parts to the said Mary : And from the said William the son, the right to his said six undivided sixteenth parts of the above described tenements with the appurtenances descended to his two children and co-heirs, to wit, the right to three of his said sixteenth parts to one William B. one of the children and co-heirs of the said William the son, and

the right to the other three of the same sixteenth parts to the said Susan one of the now demandants, the other of the children and co-heirs of the said William the son ; and of which the said T. disseised the said A. B. as aforesaid.

If in the above case, Susan had been married before bringing the action, the count would be varied as follows :

—to answer to Daniel B. and to Henry W. and Susan his wife in a plea of land, wherein they demand against the said T. eight undivided sixteenth parts of a certain piece of land, &c. which they claim as the right and inheritance of the said Daniel and Susan, that is to say, five undivided sixteenth parts thereof as the right and inheritance of the said Daniel, and three undivided sixteenth parts thereof as the right and inheritance of the said Susan, and of which the said T. unjustly, &c. disseised, &c. And whereupon the said D. H. and S. say, &c.

There is in 3 Bos. and Pul. 453, a count in a writ of right, in which after stating the death of one of four coparceners, it is said, “ and *from the said M. E. J. and H.* the right, &c. descended to the said M. J. and H. as the surviving sisters and co-heirs of the said E.” and again, after the death of Jane, one of the remaining three sisters, it is said, “ and *from the said M. J. and H.* the right, &c. descended to the said M. and H. and to the said John the demandant, as the surviving sisters, son, and co-heirs, of the said Jane.” I have not noticed any other precedent of such a statement of the descent ; and it is commonly stated as in the above form, to wit, that the share of the deceased co-parcener descended *from her* alone to her issue, or to the surviving coparceners, or whoever may be entitled as her heir.

It will be found convenient in a case like the preceding, to reduce the division at first to the lowest fractional parts that may be necessary in the distribution of the estate among the heirs ; and then to state the descent of so many of those parts, in each instance, to the respective heirs. In this case, for example, as Daniel has five parts, and Susan has three parts, of one half, it is necessary, in stating their proportions, to divide the whole into sixteen parts ; I therefore adopt this division in the first instance,

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and state the descent among the heirs of the disseisee, of eight sixteenth parts to one, and four sixteenth parts to each of the others, instead of saying that a moiety descended to one, and a quarter part to each of the others. Cases will often occur where, in tracing the intermediate descents, it will be found necessary to subdivide the shares into parts smaller than would be required for the final distribution among those who are demandants. On such occasions it will be most convenient to use throughout the lowest fractional denomination that is adopted in any part of the count.

If the action is brought by a son and grandson, on the seisin of G. F. who was father of one of the demandants, and grandfather of the other, the form may be as follows :

16. For a son  
and grandson.

—to answer to D. U. and D. N. in a plea of land, wherein they demand against the said T. a certain messuage, &c. which they claim as their right and inheritance, and of which the said T. unjustly and without judgment disseised G. F. who was the father of the said D. U. and the grandfather of the said D. N. whose heirs they are, within thirty years now last past, as it is said. And whereupon the said D. U. and D. N. say that within thirty years now last past the said G. F. was seised, &c. and from the said G. F. the right to the said messuage, &c. descended to his two children and co-heirs, to wit, the right to one undivided moiety thereof to him the said D. U. one of the children and co-heirs of the said G. F. and the right to the other moiety thereof to one M. N. the other child and co-heir of the said G. F. and from the said M. N. the right to her said moiety of the said messuage, &c. descended to him the said D. N. as the only child and heir of the said M. N. and of which, &c.

If by a father, as heir to his son, the form will be varied as follows :

17. For a father,  
as heir to  
his son.

—of which the said T. unjustly, &c. disseised A. S. the son of the said D. whose heir he is, within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past the said A. S. was seised, &c. and from the said A. S. for that he died leaving no issue (o), the right to the said tenements with the appurtenances descended to the said D. who now demands the same as the father and heir of the said A. S. and of which, &c.

(o) See stat. 1805, c. 90.

In some of the ancient books, the French word, *resortoit*, and the Latin, *resortiebatur*, are used in stating a descent from a nephew to an uncle ; but the word *descend* cannot be improper in the preceding case. Our statute of distributions and descents gives to the father, in the case here supposed, the whole real as well as personal estate of the son, and in the same language in which it gives the estate of the father to the son ; and the pleadings, which are nothing but a precise and logical statement of the party's legal right, must conform to this change of the law.

If the demandant claims the land as a sole corporation, on the seisin of his predecessor, the count will vary according to the nature of the corporation, and the right in which the demandant claims the premises. For the Minister of a Parish, suing for Parsonage lands on the seisin of his predecessor, the writ and count may be as follows :

Summon T. to answer to D. of — Clerk, and Minister of the first Parish in the said town of B. in a plea of land, wherein the said D. demands against the said T. a certain piece of land, &c. which he claims as the right of the said Parish, and of which the said T. unjustly and without judgment disseised A. B. formerly Minister of the same Parish, and the predecessor of the said D. within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past the said A. B. formerly minister of the Parish aforesaid, was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, in right of the said Parish, taking the profits thereof to the value of ten dollars by the year ; and afterwards the said A. B. died, after whose decease the said D. the now demandant was duly chosen and settled as the Minister of the same Parish, and thereupon became and still is the lawful successor of the said A. B. therein ; and of which said tenements with the appurtenances the said T. unjustly and without judgment disseised the said A. B. as aforesaid.

18. For a Minister, on the seisin of his predecessor.

This case seems to come clearly within the statute 1807, c. 75, which limits all possessory actions, on the seisin of a predecessor, as well as of an ancestor, to thirty years ; and writs of right of the like kind to forty years. This, it is obvious, may sometimes produce great injustice : for

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if a Minister should live forty years after being disseised, and should from ignorance of his rights, or from collusion with the disseisor, omit to bring his action, his successor, and the parish, would be without remedy. It is also contrary to the spirit of the statute 1785, c. 51, which provides that no alienation by a Minister, without the assent of his parish, shall be valid any longer than such alienor shall continue Minister: and as he cannot convey the land by deed, he ought not to be permitted to deprive the parish of it by any other means. The case resembles some of those mentioned in Co. Lit. 115. a. which in Lord Coke's opinion were exempted from the operation of the Statute of Limitations of 32 Henry 8. Probably however no inconvenience has been hitherto experienced from this provision of our statute; and if any should occur, or be apprehended, it might be obviated by the Legislature by giving to the immediate successor five or ten years after his settlement, to bring his action, although otherwise barred.

In all the preceding cases the disseisin is alleged to have been committed by the present tenant; and it will be observed that in every instance, after the description of the demanded premises, it is said, "of which" (*"de quibus"*) the said tenant disseised the demandant, or his ancestor, or predecessor. From this circumstance these writs have been called Writs of Entry in the *Quibus*. The same name is sometimes inaccurately applied to other writs of entry on disseisin (*p*); but it is appropriate to those in which the present tenant is charged as the disseisor. These words do not occur in any of the other writs; and the name was used to distinguish this, from the writs on disseisin in the *Per*, the *Per and Cui*, and the *Post*.

If the present tenant was not the original disseisor, but holds the tenements by a lawful conveyance, or descent, from the disseisor, he is said to be in, *by (per),* his grantor, or ancestor; and the writ, which must state this circumstance, is said to be in the *Per*.

In the case of a disseisin to the demandant himself, the form would be as follows :

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Summon T. to answer to D. in a plea of land wherein the said D. demands against the said T. a certain messuage, &c. into which the said T. has no entry but by one S. who demised the same to him, and thereof also unjustly and without judgment disseised the said D. within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past he himself was seised, &c. in his demesne as of fee and right, taking the profits, &c. and into which the said T. hath no entry but by the said S. who demised the same to him, and who thereof also unjustly disseised the said D. as aforesaid.

19. In the *Per*,  
on demand-  
ant's own  
seisin.

This is the *first* of the degrees, within which a writ of entry was limited by the common law (*q*). Booth seems to consider it in some cases as the second degree ; and in attempting to explain this subject by a reference to the writ of entry *ad terminum qui præterit*, he confounds two ideas which are totally distinct. The distinction of the degrees in these writs of entry on disseisin relates wholly to the title of the tenant, and the manner of his entry ; whereas Booth refers it to the title of the demandant, in the writ *ad terminum qui præterit* ; and considers the count on the demandant's own seisin, as the first degree, and the count on the seisin of his ancestor, as the second (*r*). It is however immaterial whether we reckon the degrees to be two or three ; as it is well settled that the writ in the *Per* and *Cui* is the last degree ; beyond which no writ of entry could be brought, until the Statute of Marlbridge gave the writ in the *Post*.

It will be observed that this writ agrees with that in the *Quibus* in all respects, except in stating the manner of the present tenant's entry into the land. From the preceding form therefore all the other writs may be readily altered, so as to make them in the *Per*, when required. As, for example, in the case of a disseisin to the demandant's father, instead of the words, "of which the said T. unjustly, &c. disseised F. the father of the said D.,"

(*q*) Finch's L. 262. Reg. 229. 2 Inst. 153. (*r*) Booth, 172.

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the demandant will say, "into which the said T. has no entry but by one S. who demised the same to him, and who thereof also unjustly and without judgment disseised F. the father of the said D. whose heir he is, within thirty years," &c.

If there have been two such alienations, or descents, between the disseisor and the present tenant, the writ must be in the *Per and Cui*; and the manner of stating the entry is as follows:

20. In the *Per*  
and *Cui*.

—And into which the said T. has no entry but by one R. to whom one S. demised the same, who thereof also unjustly disseised the said D. within thirty years," &c.—or—"disseised F. the father of the said D. whose heir he is," &c.—or—"disseised A. B. formerly Minister of the same Parish, and the predecessor of the said D.," &c.

If there were more than two such alienations or descents, the injured party could not by the common law maintain any writ of entry, and had no remedy but by a Writ of Right. The Statute of Marlbridge, chap. 30. (s) provides that in such a case the party "shall have a writ to recover his seisin, without making mention of the degrees, into whose hands soever the same thing shall happen to come by such alienations." After this statute, a demandant thus situated was allowed to use the writ of entry in the *Post*; in which, the manner of stating the tenant's entry is as follows:

21. In the  
*Post*.

—And into which the said T. has no entry but after the disseisin which one S. thereof unjustly and without judgment committed to the said D. within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past, he himself was seised of the said messuage with the appurtenances in his demesne as of fee and right, taking the profits, &c. and into which the said T. has no entry but after the disseisin which the said S. thereof unjustly and without judgment committed as aforesaid; and whereof the said D. complains that the said T. deforces him"—or—"after the disseisin which the said S. thereof unjustly, &c. committed to N. the uncle of the said D. whose heir he is, &c. &c.—and whereof the said D. complains that the said T. deforces him."

This last clause, "and whereof the said D. complains that the said T. deforces him," is not found in the *count*, in the English practice ; but it is inserted in every *writ*, in the *Post* (*t*). It is said indeed in the Register (*u*), that this clause must be inserted in every writ "*post dimissionem* ;" but the rule is laid down more generally in Fitzherbert ; and the clause is inserted, both in the Register, and in Fitzherbert, in all the writs "*post disseisinam*," as well as in those "*post dimissionem*."

The reason why these words were required in a writ in the *Post* seems to have been, that this writ, even if all the other averments in it were true, does not show that the title of the tenant is necessarily defective. He may have entered *after* one, who acquired the estate in a wrongful manner, or by a defective title ; but as it is not stated that the tenant entered *by*, or *under* him, the title of the tenant may not partake of that original wrong or defect. The demandant, therefore, having set forth as much as he knows, or as much as he is required to state, of the title of the tenant, adds a general averment, that the latter now deforces him. This is a comprehensive expression, including every species of wrong, by which he who has right to the freehold, may be kept out of possession. The effect of the averment, as used in this writ, seems to be, that the tenant, whether he holds under the person who first acquired the defective title, or not, does now unjustly withhold the possession from the demandant. If the tenant holds the premises under any other title than that supposed in the writ, this general averment leaves him at liberty to show his title, without being required to defend that which is supposed, or stated for him, in the writ.

The alienations here mentioned, which make a degree, must be lawful conveyances ; such as would give a good title to the alienee, if the alienor had a good title in himself ; and the descents, must be descents strictly speaking ; that is from ancestor to heir, and not from predecessor to successor.

(*t*) F. N. B. 201. E. 203. F.

(*u*) 228.



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The tenant is always said to be in, *in the Post*, as it respects the demandant, unless he holds the land by some lawful title derived from the person who immediately precedes him in the possession ; and also, unless his title is derived, mediately or immediately, from the disseisor or other party who had the original defective title or estate set forth in the writ. Thus if A. has disseised me, and the present tenant has disseised A. my writ against the tenant must be in *the Post*. So it must be, if the present tenant had disseised the heir of A. or any other person holding by, or under, him ; or had entered by intrusion after an estate for life granted by A ; or by abatement after the death of A ; or if he had recovered the land by judgment against A. or against his heir ; or if he had entered as the heir or alienee of any such disseisor, intruder, abator, or recoveror ; because in all these cases there is no connexion between the title of A. and that of the present tenant. So if A. held the land as a sole corporation, and the present tenant entered as his successor ; or if the disseisor were a woman, and the present tenant having been her husband, holds as tenant by the curtesy ; my writ must still be in the *Post* ; because the tenant in the two last cases does not hold *by* the party who preceded him in the possession of the land (x). In these two cases indeed, the title of the tenant is so connected with that of the party who preceded him, that he may generally try the whole merits of the action under what is called the general issue ; to wit, " that the said A. did not disseise the demandant." But in the other cases above mentioned, the tenant may often have a good title to the land, but yet such as he cannot give in evidence under that issue.

Suppose, for example, that D. the present demandant, has within twenty years past disseised T. the present tenant, it is apparent that T. has a right to re-enter and oust D ; and if sued for such entry, he may plead the general issue, and he will prevail in the suit. But suppose that before such re-entry by T. one A. a stranger, has disseised D ; this does not take away T.'s right of

(x) 2 Inst. 153.

entry ; and he may accordingly enter and oust A. or may recover the land in an action against him. Now D. instead of a writ of entry within the degrees against T. must bring his writ in the *Post* ; that is, as T. has entered by disseisin, or recovery against A, the demandant must allege that T. has no entry but *after* the disseisin which A. committed to him. In this case it is plain that although T. had a good right to enter, and is entitled to hold the land, yet if he pleads the general issue, " that A. did not disseise the demandant," he will fail in his defence. The tenant therefore in such a case must set forth in a special plea his title to the land, and show that he had a right to enter. In all the writs of entry on disseisin within the degrees, the merits of the action may commonly be tried upon the general issue, denying the original entry as alleged in the writ ; and the tenant is never driven to a special plea, unless when he has occasion to plead a warranty of the demandant, or of his ancestor, by way of rebutter ; or a release ; or some such matter, which confesses and avoids the demandant's title, or which goes, not to the gist of the action, but to the discharge of it. But in the writ of entry in the *Post*, the tenant may fail in his defence upon such general issue, although he has a perfect title to the land ; and on the other hand if the tenant pleads specially, the demandant may fail to maintain his action, although he might have been able to prove that the original entry of which he complains, and which seems to be the gist of the action, was unlawful.

The writ in the *Post* therefore wants one of the essential qualities of a writ of entry ; inasmuch as it does not always " show the unlawful means by which the tenant entered, or continues the possession ;" and even if all the material and distinct averments contained in it were true, still they would not necessarily disprove the title of the tenant ; because although the original title was wrongful, it may be that the title of the tenant was not derived from that, so as to participate of the same wrong (*y*). This consideration would lead to the belief that no writ of entry in the *Post* lay at the common law ; and this is the

(*y*) See 3 Blacks. Com. 180, 182.

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must begin by proving the seisin as he has alleged it. There is indeed one case, of a writ of entry in the *Per* on the seisin of an ancestor, in which the tenant pleaded merely that the ancestor was not so seised, and issue was joined on that plea. It is in Hil. 8 Ed. 3. 13. (381,) and the case is cited in Fitzherbert's Ab. tit. Entry 2, without any mark of reprobation. But that plea was evidently irregular, as being argumentative, and amounting to the general issue; for if the ancestor was never seised, he could not have been disseised (c).

Before the statute 4 and 5 Anne, c. 16, which allows of double pleading, the tenant in the writ of entry in the *post* must have made his election, on which point he would rest his defence; whether on proving affirmatively his own better title, or on a denial of the title set up by the demandant. But now there appears to be no difficulty in his availing himself of both grounds of defence in two distinct pleas.

There is one other case, in which, according to the opinion of Lord Coke, the writ must be in the *post*, although there should not have been two alienations or descents, nor any disseisin, &c. of the disseisor (d). That is, when the disseisor dies, leaving two daughters, and one of the daughters dies, leaving issue; in which case the surviving daughter is in the *per*, and the issue of the other daughter is in the *per and cui*: and as one writ must have been brought against both, and could not be in the *per* as to one, and in the *per and cui* as to the other, it was necessarily in the *post*. This is a case which would occur here more frequently than in England; because the inheritance here is always partible among all the children. But on the other hand, the rule which requires that one writ must be brought against all the coparceners jointly, is repealed by our statute 1795, c. 75, and each one, if sued alone, must answer for the part or share which he holds (e). Still the action *may* be brought against both of the coparceners in the case supposed, and if it is so brought, the writ must be in the *post*.

(c) See Dyer, 122. pl. 23.

(d) 2 Inst. 154.

(e) See *infra*. chap. III. § 6.

In addition to these writs of entry on disseisin, which we have adopted from the common law, we have some actions of the like kind, arising on Mortgages in fee, derived from our statute provisions on that subject, which may be conveniently considered in this place. Mortgages of terms for years are not in common use in this State.

We have no Court of Chancery ; and no bill in equity according to the English practice, to foreclose an equity of redemption. By our statute 1785, c. 22, an open and peaceable entry made by the mortgagee, or by his assigns, in presence of two witnesses, and such possession continued peaceably for three years, will foreclose the right of redemption. If the mortgagee, or his assignee, does not make such entry, he may bring an action on the mortgage-deed. If the demandant prevails in the action, the court will first ascertain and determine the amount due on the mortgage, and then enter a conditional judgment ; to wit, that if the mortgagor, or whoever is defendant in the action, shall pay to the mortgagee, or plaintiff, the sum so adjudged to be due, with interest therefor, within two months from the time of entering the judgment, then the mortgage shall be void and discharged ; otherwise the plaintiff shall have his writ of seisin. An entry by the mortgagee or his assignee under this judgment has the same effect as the entry *in pais* above mentioned, to foreclose the right of redemption at the end of three years, if the mortgage is not redeemed within that time.

When the title of the mortgagee, or demandant in the action, is not questioned, the whole suit bears a strong resemblance to a bill in equity to foreclose the right of redemption. But if the tenant in the action claims to hold the land by a title paramount to, or independent of, that of the mortgagor, or by a prior conveyance from the mortgagor, the suit then assumes a different character ; and the question of title is tried and decided as in other writs of entry (*f*).

(f) See 14 Mass. R. 409.

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II.

When the action is brought by the mortgagee against the mortgagor, the writ and count may be as follows :

22. By mortgagee against mortgagor.

Summon T. to answer to D. in a plea of land, wherein he demands against the said T. such a messuage, &c. of which the said T. unjustly and without judgment disseised the said D. within thirty years now last past, as it is said. And whereupon the said D. says that heretofore, to wit, on the — day of —, in the year —, the said T. was seised of the messuage aforesaid, with the appurtenances in his demesne as of fee, taking the profits thereof to the value, &c. and the said T. afterwards on the same day, being so thereof seised, by his certain deed of that date, sealed with his seal, and duly acknowledged and registered, and here in court produced, for a certain valuable consideration in the same deed mentioned, did grant, bargain, sell, and convey, the said messuage with the appurtenances to him the said D. and his heirs and assigns, to have and to hold the same to him the said D. and his heirs and assigns to his and their sole use for ever ; subject however to a certain proviso or condition in the same deed expressed, that is to say, that if the said T. or his heirs, executors, or administrators, should pay to the said D. or his executors, administrators, or assigns, the sum of one thousand dollars, with lawful interest for the same, on or before the — day of —, according to the condition of the said T.'s certain bond bearing even date with the deed aforesaid, and made and given by the said T. to the said D. then the said first mentioned deed should be void ; as by the same deed, reference being thereto had, will amongst other things more fully and at large appear ; by virtue whereof the said D. then became and was seised of the said messuage with the appurtenances in his demesne as of fee, subject to the condition aforesaid, taking the profits thereof to the value of one dollar by the year : And the said D. further says, that the said T. has not paid to him the said D. the said sum of one thousand dollars, nor any part thereof : And of which said messuage with the appurtenances the said T. unjustly disseised the said D. as aforesaid.

The statute 1785, c. 22, speaks of this as a real action ; and the object of it is to recover the land, if the money should not be paid within the time prescribed ; it is therefore entitled “ a plea of land,” like the other real actions.

The averment of an actual seisin by the mortgagee, by taking the profits, seems to be proper ; as the demandant

cannot know that his title to the land will not be disputed; and the action ought therefore to have all the essential qualities of a real action at the common law. On the other hand, this confession of the receipt of rents and profits cannot prejudice the demandant in taking the account of what is due to him on the mortgage; as a seisin for any period, however short, would satisfy that averment.

If the mortgage were made to secure the payment of a note, instead of a bond, which is now the most common course in this State; then say,

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—according to the tenor of the said T.'s certain promissory note bearing date on the — day of — in and by which the said T. promised the said D. to pay him the said sum of one thousand dollars with lawful interest at the time aforesaid; then, &c.

23. The like, when a promissory note is given for the debt.

When the action is brought by an Assignee of the mortgagee, the form may be varied, as follows.

—in a plea of land wherein the said D. demands against the said T. such a piece of land, &c. of which the said T. unjustly, &c. disseised the said D. within, &c. And whereupon the said D. says that heretofore, to wit, &c. (*stating the seisin of T. and his conveyance to one A. B. upon condition, as in No. 22. supra,*) by force whereof the said A. B. then became and was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, subject to the condition aforesaid, taking the profits, &c. And the said A. B. afterwards on the — day of — being so thereof seised, by his certain deed of that date sealed with his seal, and duly acknowledged and registered, and here in court produced, for a certain valuable consideration therein expressed, did grant, bargain, sell, assign and convey, to him the said D. and his heirs and assigns the tenements aforesaid with the appurtenances, and also the said bond (or, the said promissory note) mentioned in the aforesaid deed of the said T. with all the moneys due and growing due thereon; to have and to hold the tenements aforesaid with the appurtenances to him the said D. and his heirs and assigns to his and their sole use forever, subject to the condition aforesaid; as by the said last mentioned deed, reference being thereto had, will amongst other things more fully and at large appear; by virtue of which said last mentioned deed the said D. then became and was reised of the tenements aforesaid with the appurtenances in his

24. By assignee of mortgage against mortgagor.

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demesne as of fee, subject to the condition aforesaid, taking the profits, &c. and the said D. further says that the said T. has never paid the said sum of one thousand dollars nor any part thereof, neither to the said A. B. nor to him the said D. And of which said tenements with the appurtenances the said T. unjustly and without judgment disseised the said D. as aforesaid.

The disseisin is alleged to have been committed to the demandant, who is the assignee; because if it were alleged to have been committed to the mortgagee, it would not comport with the averment of a subsequent assignment made by him, and might perhaps even show that such supposed assignment was void (*g*). When the action is brought by the assignee against the mortgagor, there can be no difficulty in proving the disseisin as here alleged, that is, as having been committed to the demandant; provided the demandant is entitled in other respects to maintain the action. The mortgagor cannot dispute the title of the mortgagee, or of his assignee; and if he has been permitted to continue in possession (which is the common course here, even without any covenant to that effect,) he cannot say that he had disseised the mortgagee before the latter made the assignment; but he is considered a disseisor only at the election of the assignee.

When the action is brought against any person other than the mortgagor, the disseisin should be alleged in like manner as in other writs of entry on disseisin. If indeed the present tenant holds under a subsequent conveyance from the mortgagor, and subject to the right of the mortgagee, there would be no disseisin but at the election of the demandant; and he might therefore declare on a disseisin by the present tenant. But as this fact may not be certainly known to the demandant, when commencing his action, it is safer to bring his writ in the *per*, the *per and cui*, or the *post*, according to the number of assignments on the part of the mortgagor, and the other circumstances of the case; and the writ in that form will be good, whether the conveyance to the present tenant was made, subject to the claim of the mortgagee, or not.

(*g*) But see 13 Mass. R. 487, 488.

In the case of a mortgage in fee, there might have been some doubt, whether after the death of the mortgagee, his heir, or executor, should bring the action. But our Legislature have decided, according to the true nature and object of the conveyance, that such a mortgage is substantially a chattel interest; and that the lands mortgaged, as well as the debt, shall be assets in the hands of executors and administrators. They are accordingly authorised by statute 1788, c. 51, to bring actions for recovering lands so mortgaged; in which actions they may declare "on the seisin and possession of the testator or intestate" (*h*). The lands when so recovered, are held by the executor or administrator in trust for the creditors, or for the legatees, or the next of kin, of the deceased; according to the final settlement and distribution of the estate in the Probate court (*i*).

When the action is brought by an executor or administrator, the writ and count may be as follows:

Summon T. to answer to D. executor of the last will and testament of A. B. late of — Esquire, deceased (or, administrator of the goods and estate which were of A. B. late, &c. deceased, at the time of his decease) in a plea of land, wherein the said D. demands against the said T. such a piece of land, which he claims to be his right and inheritance as such executor as aforesaid, to be administered as the estate which was of the said A. B. at the time of his decease; and of which the said T. unjustly and without judgment disseised the said A. B. within thirty years now last past, as it is said. And whereupon the said D. executor as aforesaid says that heretofore, to wit, (*stating the seisin of T. the mortgagor, and his conveyance to the said A. B. "then in full life," as in No. 22. supra.*) by virtue of which, the said A. B. then became and was seised, &c. subject, &c. taking the profits, &c. And the said D. further says that the said T. did not pay the said sum of — nor any part thereof to the said A. B. in his lifetime, nor hath he paid the same nor any part thereof to the said D. as executor as aforesaid since the decease of the said A. B. And from the said A. B. the right of the tenements aforesaid with the appurtenances subject to the said condition, according to the form of the statute in such case made and provided, came to and vested in him the said

25. By executor of mortgage.

(*h*) 16 Mass. R. 18.      (*i*) 4 Mass. Rep. 598, *Boylston v. Carver*.



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D. as such executor as aforesaid (*k*), who now demands the same as such executor to be administered as the estate which was of the said A. B. at the time of his decease; and of which said tenements with the appurtenances the said T. unjustly and without judgment disseised the said A. B. as aforesaid.

If the executor or administrator has ever had possession under the mortgage for breach of the condition, either by virtue of a judgment, or by an entry *in pais*, he is thereupon seised of the legal estate, in trust as above mentioned; and if afterwards ousted, he may, as I apprehend, count on his own seisin as of an absolute estate in fee (*l*). It would be expedient in such a case, if not absolutely necessary, for the demandant to call himself executor, or administrator, and to claim the land as such, and allege the seisin in himself in that capacity. There seems to be no necessity to set forth the manner in which he acquired his title; inasmuch as by the statute, of which the court will take notice without a particular reference to it, an executor or administrator *may* be so seised; and when he is so, may maintain his possession against any one who should wrongfully oust him. So if the mortgagee himself, or his assignee, is in possession for breach of the condition, he may bring a writ of entry in the common form against whoever should disseise him; and may count on his own seisin as of an absolute estate in fee. The object of such an action is to maintain his lawful possession against a wrong-doer; and not, to obtain a conditional judgment, and foreclose the right of redemption according to the provisions of the statute; there is therefore no occasion to set forth the mortgage, or any other particulars of his title. If it should appear in the subsequent pleadings that the estate of the demandant was in mortgage, that is, subject to a condition by which it might be thereafter defeated, this would not be repugnant to the general averment of his seisin in fee at the time of the ouster, and would not falsify his count in that

(*k*) See 2 H. Black. 444. *Smith & al. v. Coffin & ux.* A count by Assignees of a Bankrupt in a writ of entry on Abatement.

(*l*) 4 Mass. Rep. 598, *Boylston v. Carver.*

particular. So if the mortgagee, or his assignee, chooses to take possession of the land, before any breach of the condition, which he may always do, if there is no covenant or agreement to the contrary, he may bring his writ of entry against the mortgagor or his assignee, in the common form, counting on his own seisin, without mentioning the mortgage.

The writ of entry on Disseisin may be brought for any aliquot part of lands or tenements; and if it is brought for the whole, the demandant may have judgment for any part or portion to which he proves his claim (*m*). It is said indeed, in 2 Salk. 423, that a man cannot be disseised of an undivided moiety; but that was a case in which two persons were in possession, supposing themselves entitled each to one moiety as coparceners, when in fact the whole belonged to one of them; and it was held that the right owner was not disseised by the other tenant; because where two men are in possession, the law will adjudge the possession to be in him that hath right (*n*). But I may be seised as a tenant in common of an undivided moiety, and may be disseised of it by a stranger; and in such case I must bring my action alone for my moiety, because tenants in common cannot join in a real action. So I cannot have one writ against two tenants in common. If therefore my disseisor alienes to two persons successively, giving an undivided moiety to each, I must bring a separate action against each for his moiety (*o*).

(*m*) 2 Pick. R. 387.

(*n*) See 1 Salk. 246. Plow. 233.

(*o*) Bro. Joinder in action, 83.

## CHAPTER III.

*Pleas in Abatement.*CHAP.  
III.

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UNDER this title we find in the books of practice several kinds of pleas, varying from each other, not only in form, but in substance; and varying also as to the judgments that may be rendered upon them. A plea to the jurisdiction differs from a plea in disability of the person; and both of these differ from a plea to the writ, or to the count. Some of these pleas give the Plaintiff or Demandant a better writ; and some of them, if maintained, show that he can have no action whatever against the defendant for the supposed injury. Upon some of them the court may render a judgment which is final in that suit; and upon others, if found to be true, there is no present judgment, but only a suspension of the suit. Also some of them, even in ancient times, might be pleaded either to the writ, or to the action, at the election of the tenant, or defendant (a).

These pleas in real actions differ much from each other in another respect. Some of them relate merely to the form of the writ or count, and apply to faults which, if not noticed, would have no effect on the subsequent proceedings in the suit; but which, when thus pointed out, will abate the writ, if not amended. Others of them apply to faults or mistakes in the writ or count, which affect materially the defence of the party who is impleaded. The matter of pleas of this last description cannot be given in evidence by the tenant under any general issue, nor under any plea to the action, that was allowed by the

(a) See Thel. Dig. L. 15, c. 4. Com. Dig. Abatement (I. 2.) 83 H. 6. 38. Vin. Abatement (Y. s) Bro. Briefs 409. 488. The Year Book appears to be mis-cited.

ancient common law ; and if not pleaded specially, the tenant might sometimes fail in his defence, although he had a good title to the land. If real actions had been commonly used in the English courts for the last two centuries, it is not improbable that all these pleas which affect the merits of the action, or of the defence, would have been gradually allowed to be pleaded in bar (*b*). Such a change has taken place with regard to some pleas of a like description in personal actions (*c*). In this State some advances have been lately made in the same way in real actions ; and there seems to be no objection to pursuing the same principle still further, and allowing the tenant to plead in bar any matter which shows that the action is misconceived, and that the tenant may be materially prejudiced by the defect ; although the matter be such as in ancient times was pleadable only to the writ, or count, or to the action of the writ. This is a more important consideration here, than it is in the English practice ; because by our laws, all pleas in abatement must be filed at the first term of the Court in which the action is entered ; at which early stage of the action the tenant may be, and frequently is, unacquainted with the merits of his case, and not prepared to decide on the manner of conducting his defence.

The pleas in abatement are nearly the same in all the writs of entry. I propose to consider in this chapter all those which can be pleaded to writs of entry on disseisin, in the order in which they are arranged in Comyns' Digest, title Abatement ; omitting those which are in common use in personal actions.

#### SECTION I.

##### *Pleas to the Jurisdiction.*

Every real action must be brought in the county in which the land lies. If brought in a court in any other county, the writ would be abated ; but in our practice

(*b*) See 2 Saund. Rep. 44. n. 4, by Williams.

(*c*) See 1 Saund. 274. n. 3, and the books there cited.

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there is no occasion for a plea to the jurisdiction in such a case. The count, which is always inserted in the writ, describes the land with as much precision and certainty, as would be required in a deed for the conveyance of the same land ; it must therefore always appear on inspection whether the action is brought in the proper court, and if not, the writ will be abated of course. If the land is not described with sufficient certainty, the writ may be abated for that cause ; or the tenant may demur to it, according to the nature of the defect.

## SECTION II.

*Pleas to the person of the Demandant.*

There are several of these pleas, which are not in use in this State, as the laws on which they are respectively founded have no existence here. Such are the Villenage, Attainder, Profession, and Excommunication of the demandant. Those which we have retained, are the pleas of Outlawry, Alienage, and Coverture of the demandant.

*Outlawry.*

The process of outlawry is prescribed in the statute 1782, c. 19, and differs materially from the process at common law. By the 5th section of the statute it is enacted that all persons so outlawed shall be disabled, so long as the judgment of outlawry continues in force, "from bringing or maintaining in their own right any civil action or suit, in any court of law or equity within this Government, excepting a writ of error for reversing the outlawry." By this statute the process can issue only against one who is charged with some criminal offence before the Supreme Judicial Court, upon an indictment, either found in that court, or removed thither by appeal or *certiorari* ; and in all cases, where a greater forfeiture would not by law accrue to the Commonwealth, in case of a conviction and judgment on such indictment, the party outlawed shall forfeit the issues and profits of all his real estate during

his life, in case the judgment of outlawry shall so long remain in force. By the statute 1785, c. 46, constables and collectors of taxes are made liable, in certain cases, to process and judgment of outlawry; and by the statute of Treasons, passed in 1777, persons indicted for treason, or misprision of treason, may be likewise outlawed. In this latter case the outlawry amounts to an attainder of the party charged; and upon such attainder the party, if charged with treason, forfeits to the use of the State "all lands, tenements, and hereditaments which any such offender shall have, of any estate of inheritance, in use or possession—at the time of such treason committed, or at any time after;" and if charged with misprision of treason, he forfeits the profits of his lands during his life. By the same statute it is enacted, that the State shall be deemed and adjudged in the actual and real possession of the lands, tenements, and hereditaments so forfeited. An outlawry under either of these statutes would be a bar to any action brought for lands which are thereby forfeited (*d*).

In the statute 1785, c. 46, no express provision is made for any forfeiture in case of an outlawry for the cause there mentioned. It was perhaps considered as coming within the provisions of the above mentioned general statute concerning outlawry; and if so, the lands of the outlaw would be forfeited to the use of the Commonwealth during his life, if the judgment of outlawry should remain so long in force. If, on the other hand, this case is not governed by the statute 1782, c. 19, and if such an outlaw forfeits only his goods and chattels, as by the common law; it will follow that in a real action brought by him, his outlawry can be pleaded only in disability of his person.

At the common law, a distinction was made between an outlawry, in force when the action was commenced; and an outlawry, which occurred pending the suit. In the former case the writ was abatable; and the plaintiff, after a pardon or reversal of the outlawry, must bring a new action. But in the latter case, the action was only

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suspended; and as soon as the plaintiff's disability was removed, he might recontinue it. The plea was varied accordingly; in the one case saying, that the plaintiff ought not to be answered; and in the other, that he ought not to be further answered.

The process of outlawry has been seldom, if ever, used in our courts; and it is therefore unnecessary to make out the form of a plea. It would contain nothing but a statement of the proceedings prescribed by the statutes above mentioned, with the beginning and conclusion appropriate either to a plea in bar, or to a plea in disability of the person, whichever of those forms should have been adopted. The demandant might reply, *Nul tiel Record*; or a reversal of the outlawry upon a writ of error, as at the common law; or a reversal, in the peculiar modes prescribed by the said statutes. When the plea is to the person, the succeeding entries, and the process of resummons after the removal of the disability, resemble those on a plea of alienage, when the latter operates as a temporary disability (e).

## SECTION III.

*Alienage.*

If the demandant is an alien, whether a friend, or an enemy, he is disabled to maintain any real action. The common opinion with us has been that this fact must be pleaded in disability, and never in bar; and the point was so decided many years ago in the Supreme Court of this State. Yet this plea, if supported, shows that the demandant "cannot maintain any action at any time" for the land in question; and thus answers exactly to the common description of a plea in bar (f); and even in the times of ancient strictness, it has been said that it might be pleaded either to the action, or to the person (g). In

(e) See *infra*, § 3.

(f) 1 Chitty on Plead. 434. 1 Saund. 274. n. 3, by Williams.

(g) Thel. Dig. L. 15, c. 4, § 4. 32 H. 6. 23. 10 H. 7. 11. Bro. Barre, 64. 102. Doct. Plac. 298.

the case of *Hutchinson v. Brock*, 11 Mass. Rep. 119, it is suggested by Chief Justice Sewall, that in a real action alienage may be pleaded either in abatement or in bar; and the reason assigned is, because it shows that "for that cause of action the demandant has no right to recover;" that is, the alienage produces not merely a present disability to bring, or to maintain, an action; but a perpetual bar of the supposed right of action.

As it is not doubted that this fact may be pleaded in disability of the demandant, I proceed to give the form of such a plea; and if it should be decided that it may also be pleaded in bar, as I presume it now would be, this form may be readily altered, by substituting the proper beginning and conclusion of a plea in bar.

And the said T. comes and defends his right, when, &c. and says 1. Plea of that the said D. ought not to be answered to his writ aforesaid, because he says that the said D. is an alien, born in foreign parts, out of the allegiance of this Commonwealth and of each and every of the United States, and within the allegiance of the King of Spain, to wit, at C. in the Kingdom of Spain; and this he is ready to verify; wherefore he the said T. prays judgment if the said D. to his writ aforesaid ought to be answered, and for his costs. alien friend.

The *full defence*, with which the above plea begins, is made in every plea to a writ of entry, excepting pleas to the jurisdiction of the court; in which latter the words, "when, &c." seem to be rightly omitted (*h*).

I have stated the place where the demandant is alleged to have been born, in conformity to some of the modern precedents, although it appears to be unnecessary (*i*). The allegation is introduced under a *videlicet*, and is not material, nor traversable; and it is omitted in some of the ancient books (*k*).

It is alleged that the demandant was born out of the allegiance of each and every of the United States, as well as, of this Commonwealth, because by the constitution of

(*h*) See Rast. Ent. 101.

(*i*) 4 East, 502. 1 Chit. on Plead. 446.

(*k*) Rast. Ent. 605. Clift's Ent. 4.



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the United States, "the citizens of each State are entitled to all privileges and immunities of citizens in the several States."

To this plea the demandant may reply, either by traversing the fact that he was born an alien, or by showing that he has been naturalized.

A replication, that the demandant is a native citizen, may be as follows :

2. Replication,  
that he is a  
native citizen.

And the said D. says that he ought not by reason of anything by the said T. above in pleading alleged, to be prevented (*or*, repelled, *or*, precluded) from having an answer (*or*, being answered) to his said writ, nor from having and maintaining his action aforesaid thereof against the said T. because he says that he is a native citizen of this Commonwealth (*or*, of the State of New York, &c.) born at B. in the county of S. within this Commonwealth (*or*, at —, in the said State of N. York) and not an alien, as the said T. has above alleged ; and this he prays may be inquired of by the country (*l*).

The traverse and the issue tendered in this replication correspond with the precedents in Rast. Ent. 252, and Aston's Ent. 11. Upon trial of the issue thus formed the tenant has the affirmative, and must prove that the demandant is an alien, as alleged in the plea. This conforms to the general principle, that whichever party alleges a material fact may be required to prove it, and shall not compel the other party to prove the contrary (*m*). Yet in 4 Mod. Rep. 285, such a replication was on a general demurrer adjudged to be bad ; because, as it was said, the replication contained new matter, and therefore ought to have concluded with a verification, to give the defendant opportunity to rejoin. The only new matter in that replication was that the plaintiff was a native subject born at such a place within the king's allegiance.

(*l*) Rast. Ent. 252. 282. 368. 439.

(*m*) So when the tenant pleads that the demandant holds jointly with one C. who is in full life, and not joined in the writ ; and the demandant replies that C. is dead ; the issue must be joined on the life of C. and not on his death ; "for the issue comes from the tenant." 22 Ed. 3. 8.

This is directly contrary to the averment by the defendant, that he was an alien ; but the replication, if it stopped there, would not form an apt issue. It therefore proceeds to traverse the averment, that he is an alien ; and as this averment comprises the whole matter and substance of the plea, the traverse ought of course to conclude to the country (*n*). This agrees with the general course of pleading ; and the objection, respecting the new matter introduced, would apply with equal force in every instance when there is an inducement concluding with a traverse.

It seems to have been thought that the issue ought to be joined on the averment that the plaintiff was born within the allegiance, &c. because if joined on the averment that he was born in a foreign country, it could not be tried for want of a proper venue (*o*). But a venue is unnecessary in this case ; as all real actions are local in their nature, and every issue must be tried where the action is brought (*p*).

There have been contradictory opinions and decisions on the subject of this replication (*q*) ; but the form here adopted from Rastel seems to be warranted by the better reason, if not also by better authority. The tenant says that the demandant is an alien. This is the substance of the plea ; and the allegation that he was born at a certain place in a foreign country, even if inserted in the plea, need not be proved precisely as alleged ; for if he was born in any foreign country, out of the allegiance of this State, he is disabled to maintain the action. The demandant denies that he is an alien ; and by way of inducement to this traverse, states that he was born at a certain place within the allegiance of this State. Here again, it is not necessary to prove that he was born in the particular town or place mentioned in the replication ; because if born in any place within the allegiance of the State, he is not an alien. If this is a correct view of the na-

(*n*) 1 Bur. 316. Doug. 428. *Smith & al. v. Dovers*.

(*o*) Carth. 265.

(*p*) See 1 Saund. 8. n. 2, by Williams.

(*q*) See Ld. Raym. 101. 853, and the cases cited in the note to Saunders, ubi supra.

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ture and effect of the pleadings, it is clear that the demandant may traverse the allegation in the plea, and conclude to the country. In that case the burthen of proof rests on the tenant; he has the affirmative; and unless he produces some evidence to prove that the demandant is an alien, the latter will have a verdict, without producing any evidence on his part.

On the other hand, if upon a bare averment by the tenant, that the demandant is an alien, the latter is obliged to show that he is a citizen; and if the demandant may in every case be prevented from proceeding in his suit until he shall prove that fact, although no evidence to the contrary is offered by the tenant; then the other mode of replying would be the most correct. The demandant in answer to such a plea, should then say merely that he was born within the allegiance of the state, and conclude with a verification; and the tenant in his rejoinder would traverse that fact, which would thus be the only point in issue. There seems to be no sufficient reason for this deviation from the general rules of pleading.

A replication, that the demandant has been naturalized, may be as follows:

3. Replication,  
that he has  
been natural-  
ized.

And the said D. says that, notwithstanding any thing by the said T. above in pleading alleged, he ought to be answered to his writ aforesaid, (or, that he ought not by any thing by the said T. above in pleading alleged, to be repelled from having an answer to his writ aforesaid,) because he says that heretofore, to wit, on the — day of — in the year of our Lord — he was entitled to become a citizen of the U. S. according to the laws then in force in that behalf; and being so entitled, upon his application to the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts (or, to any other court, as the case may be,) held at — within and for the county of — on the day last aforesaid it was by the Justices of the same court considered and ordered that he the said D. should be admitted, and he was then and there by the same court duly admitted, to become a citizen of the U. S. as by the record thereof in the same court now remaining more fully and at large appears; and this he the said D. is ready to verify and prove by the said record: Wherefore he prays judgment, and that the said T. may be held to answer to his writ aforesaid.

By the 9th article of the Treaty between the United States and Great Britain, made in the year 1794, it was provided that the citizens and subjects of each nation who then held lands respectively in the territories of the other, should continue to hold them according to the nature and tenure of their respective estates and titles therein; and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives; and that neither they nor their heirs or assigns should, so far as might respect the said lands, and the legal remedies incident thereto, be regarded as aliens. A British subject, therefore, whose case comes within that article, may reply, to a common plea of alienage, the facts necessary to bring his case within the treaty; and conclude with praying judgment as in the form last preceding.

But although this article removes the common disability arising from alienage, it does not remove that which arises from a state of war between the two countries (*r*); and of course a war would produce a temporary disability of the demandant, and a suspension of the suit, in like manner as it does in personal actions. It follows that the tenant in such a case might in his rejoinder state the existence of the war, and aver that the demandant was an enemy, and that he resided in Great Britain, or had come to this country without letters of safe conduct, as in a plea of alien enemy in a personal action. If the tenant, when making the plea of alienage, knows that the demandant's case comes within this article of the treaty, there seems to be no objection to inserting in his original plea these additional averments of the war, &c. which would prevent an unnecessary prolixity of pleading; and if the war is declared after the commencement of the action, and after a plea by which the demandant's ability to sue is admitted, the plea (which will then be pleaded *puis darrein continuance*) must contain those additional averments.

If the war should exist at the time of bringing the

(*r*) 11 Mass. Rep. 119, *Hutchinson v. Brock*.

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suit, it may be thought, by analogy to the case of outlawry, that the writ would be abated. This result might be highly injurious to the demandant; as the time prescribed for his action by the statute of limitations might elapse before the restoration of peace. Perhaps upon a fair and liberal construction of the treaty, he ought to be permitted to commence his action, even during the war; so as to prevent his being barred by the statute of limitations; although he could not prosecute the action until the restoration of peace. If this should be deemed a correct construction of the treaty, the form, and the effect, of the plea in that case would be substantially the same, as in the case of a war declared during the pendency of the action.

When the facts thus stated, whether in a plea, or in a rejoinder, are admitted by the demandant, the entry may be as follows :

4. Entry of  
*Remaneat lo-*  
*quela.*

—And because the said D. doth not deny the matters in the plea of the said T. above alleged, (or, the matters above alleged in the plea of the said T. in rejoining pleaded,) therefore let the action aforesaid remain (or, it is ordered by the court that the action aforesaid remain) without day until peace be restored between the United States and the said King of the United Kingdom of Great Britain and Ireland.

If the truth of the facts should not be confessed, but found by the verdict of a jury; or if the demandant should demur, and the plea should be adjudged good and sufficient; the former part of the entry would vary accordingly; after which the order for the suspension of the suit would be entered as above.

Upon the restoration of peace the demandant may take out a writ of resummons, or reattachment, according to the nature and form of his original writ. In our practice, the original writ may be a Summons, or an Attachment against the body, or the goods and estate of the tenant; and when the latter writ is used, it is accompanied by a Summons to the tenant, in which is stated briefly the substance of the count. The former is the writ almost always adopted in real actions; as there are no damages

to be recovered, and therefore no occasion to attach the goods or estate of the tenant, unless perhaps for the costs of the suit; and if his body should be arrested, the statute 1795, c. 75, provides that his own bond, and no other, shall be required for his appearance to answer to the action.

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The writ of *resummons* may be in the form following:

The Commonwealth — to the Sheriff, &c.

We command you that you resumon T. of — (if he may be found in your precinct) to appear before our Justices of our Supreme Judicial Court (or other court, as the case may be,) to be held at — within and for our said County of — on — next, then and there to hear the record and judgment of an action which was in our said court between D. of — demandant and the said T. tenant of a certain piece of land with the appurtenances in B. in our said County, which the said D. demanded [as his right and inheritance] against the said T. so that the said action may then be in our said court in the same state in which it was before the Justices of our said court begun and held at — within and for our said County on the — day of — in the year of our Lord — from which said last mentioned term the said action remained without day, by reason of the war then existing between the United States and the King of, &c. since which time peace has been established between the United States and the said King of, &c. as the said D. saith. And have you there this writ, with your doings therein. Witness, &c. (s).

5. Writ of Resummons.

As this is considered a judicial writ, there is in the English practice an award or order of the court for the issuing of it, at the prayer of the demandant; all which is entered on the record, as follows:

—And afterwards, to wit, at the said Supreme Judicial Court begun and held, &c. the said D. comes here into court and says that peace is now established between the United States and the said King, &c. and he prays a writ, to be directed to the Sheriff of the County of —, to resumon the said T. to appear in this court next to be held, &c. to hear the record and judgment of the action aforesaid; and the same is granted to him, returnable as aforesaid.

6. Order of court for the writ of Resummons.

(s) See Rast. Ent. 26. 7 Co. R. 114.

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In our practice it is not usual to enter on the record a prayer of the party, and an order of the court, for the issuing of an execution, or other judicial writ, which is demandable of right. In this case there would be a peculiar inconvenience in such a course, as it might delay the parties a whole term; and there seems to be no impropriety, in suing out the writ from the Clerk's office in vacation, as we do in many other like cases.

Upon the due return of this writ, the action will be entered anew on the docket of the same court in which it was before pending; and the parties will stand in the same situation respectively as they were when the plea of alienage was filed.

It was observed in the preceding section that the entries and proceedings, when outlawry is pleaded in disability of the person, would be like those on such a plea of alien enemy. The only difference consists in stating the reason of the action's remaining without day. In case of outlawry it will be as follows:

—from which said last mentioned term the said action remained without day, because the said D. was then outlawed; which said outlawry is now reversed; as the said D. saith, &c.

## SECTION IV.

*Coparcenary and Joint-tenancy, on the part of the  
Demandant.*

In the class of pleas to the person of the demandant, Comyns includes those which show that another ought to have joined as demandant in the writ. It is now well settled that in personal actions this defect need not be pleaded in abatement. If the fact appears in evidence on the general issue, or on any issue on which the plaintiff is put to show his title, or cause of action, as set forth in his declaration, he will be nonsuited, or have a verdict against him; and there seems to be no reason why the same rule should not have been adopted in real actions. It is equally true in both cases, that the evidence does not comport with the declaration or count, and does not

maintain the title which the party has relied on. If a demandant in such a case were permitted to recover the whole land, he might deprive the tenant of a part, which the right owner of it would perhaps never have demanded; and to which the tenant may have at least as good a title as the demandant.

The pleas of this description are, that there is a Coparcener, or Joint-tenant, with the demandant who is not named in the writ. If this coparcener, or joint-tenant, is the wife of the demandant, the case would fall within the same principle as if it were a stranger in the like circumstances. But if the wife sues alone, the writ may be abated by the common plea of coverture, as in personal actions; whether the husband has any thing in the premises in his own right, or not.

The omission of a tenant in common with the demandant, could never be pleaded at the common law; because a tenant in common, or one claiming as such, must always have sued alone in a real action, and could not have joined with his co-tenant; and now, this plea of the omission of a coparcener or joint-tenant with the demandant is taken away by our statute 1785, c. 62. By the 3d section, in order "to prevent any doubts respecting the manner in which heirs are to prosecute in the courts of law, for possession of an inheritance descended to them from a common ancestor," it is enacted that in all real actions, "where possession of the inheritance alleged to have descended is the object of the suit, they may all, or any two or more of them, join therein, or each one may prosecute for his particular share of such inheritance; and the same rule shall extend to joint-tenants who are or may be disseised." The case of coparceners who are themselves disseised, is not expressly provided for; but perhaps it would be considered as within the purview and equity of the statute (*t*).

(*t*) See 2 Pick. R. 387.



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## SECTION V.

*Several joined, when one only ought to sue.*

This also is set down by Comyns (*u*) among the pleas in abatement. It is however apparent, even from the cases which he cites, that it is not always necessary to plead this matter specially, either in abatement or in bar. In one of those cases the fact was first disclosed in a special verdict, on a plea of the general issue to an action of trespass; and in several of the cases on writs of error, the misjoinder appeared on the face of the record, and the writs were abated on motion, without any plea whatever.

The law seems to be, that the misjoinder, when it is made regularly to appear to the Court, will always have the effect to abate, defeat, or destroy the action (*x*); and therefore that it is never necessary to plead it specially, unless when the ground of objection is of such a kind that it cannot otherwise be made to appear to the court. For example, in a writ of entry by two or more on their own seisin as joint-tenants, if the general issue were pleaded it would be necessary for them to prove their seisin as alleged; and if it should appear on the trial that one of them was never seised, they would all, I apprehend, be nonsuited. But if two or more should bring an action as heirs, on the seisin of their father, the tenant would not be allowed to prove on the general issue that one of them was a bastard; because in a trial on the general issue, a demandant, suing as heir, is never required to prove his heirship (*y*). The illegitimacy therefore could not be made to appear without a special plea; which would be substantially the same as when pleaded to a sole demandant. The same rule would apply if the objection were founded on the outlawry, or alienage, of one of the demandants.

(*u*) Abatement (E. 15.)

(*x*) See Plowd. 84. Fitz. Office de Court, 7. Bro. Office de Court, 29.

(*y*) See *infra*, chap. IV. § 6.

If the plea were founded on a disability of one of the demandants, that was in its nature perpetual, as illegitimacy or alienage, it might, I apprehend, be pleaded in bar, as showing that *these demandants* cannot maintain any action at any time for the land in question. When it is founded on a temporary disability of one of the demandants, as in excommunication, and some cases of outlawry, it is not a case of misjoinder; for at the common law it was necessary to join all the coparceners or joint-tenants, and if any one could not, or would not, prosecute the suit, he might be summoned and severed. The plea therefore in such a case was substantially the same as a plea of excommunication or outlawry to a sole demandant (z).

When it is necessary to plead this matter specially, whether in abatement, or in bar, the plea may be readily framed by reference to the respective pleas of the like kind to a sole demandant.

## SECTION VI.

*Pleas to the person of the tenant.*

Of this class the pleas of Profession and Villenage are not in use here.

*Coparcenary, and joint-tenancy on the part of the tenant.*

The plea, that another ought to have been joined as a tenant in the writ, is taken away by our statute 1795, c. 75. It is enacted by that statute, that when any person or persons shall be sued in any real action, "they shall be held to answer for so much, or such part, of the premises demanded as they hold, or are in possession of, which they shall distinguish and set forth by their plea, and disclaim in the rest." If therefore the tenant holds with a coparcener or joint-tenant not named in the writ, the demandant may nevertheless recover against him for so much as he does hold. So if the tenant holds only a certain part

(z) Com. Dig. Abatement (E. 2. 5. 7.) 10 Mass. R. 179.

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of the land, in severalty, or if he holds an undivided portion, in common with others not named in the writ, the demandant may recover that part or portion so held by the tenant. If the other coparcener, or joint-tenant who is omitted is the wife of the party who is sued, the rule is the same; that is, the husband must answer for so much as he holds in his own right. But if the action is brought against a wife, her husband must be joined *as husband*, to enable her to answer to the suit, whether he also holds any thing in his own right or not.

## SECTION VII.

*Several Tenancy.*

When two or more persons are sued in the same action, they are always supposed to be joint-tenants or coparceners of the land demanded (*a*). If they are not so, the writ may generally be abated, in part or in whole, according to the circumstances. If they hold jointly, or in coparcenary, a certain part of the premises, and no one of them has any thing in the residue, they must answer as to that part, and may plead non-tenure as to the residue; in the same manner as if there had been only one tenant named in the writ. In this case the writ abates, or the action is barred, as to the part to which non-tenure is pleaded and proved; and the action proceeds as to the other part. But if any one of the persons named as tenants in the writ holds a certain part of the land in severalty, or a certain portion of the whole in common, he may plead this several tenancy; and this will most frequently, though not always, produce an abatement of the writ. So if three are sued, and two of them hold a certain part jointly with each other, but in severalty from the third person, they may plead in like manner.

Joint-tenants and coparceners, having the same title, may always without difficulty join in their defence. But when two or more tenants in common, or tenants in se-

(*a*) Bro. Joinder in action, 83. 3 E. 4. 10. 12 Mass. R. 480.

veralty of distinct parcels, are sued together, as their titles may be wholly different, they may have different grounds of defence ; in which case they cannot join in their pleas. If the demandant has improperly joined them in the same action, this ought not to deprive them of any just ground of defence ; and of course each has a right, without regarding the other, to plead any matter that shall appear to him best suited to his case (b). In this course it is apparent that there might be as many different actions to be tried, as there were tenants named in the writ ; and therefore if the demandant should reply to each of the pleas, he would abate his own writ ; that is, he would tacitly admit that his writ contained two or more distinct causes of action, which by law could not be joined. Of course, the only replication that he can make in such a case is to maintain his writ ; that is, to aver that the parties who have thus pleaded, did hold jointly, as supposed in the writ. Such a replication would not be an apt answer to the pleas, if they contained merely the bar, or matter of defence relied on by the tenants respectively ; and this no doubt is one reason why each of the pleas in such a case should begin by stating that the party holds in severalty the part to which his plea applies. Such a statement is also necessary, in order to introduce the defence as applied to that part, and to show that the tenant has a right to make this defence alone.

As the abatement of the writ in such a case seems to have taken place merely from the impossibility of trying two distinct issues, or rather of maintaining two distinct actions, under one writ ; so when that difficulty did not occur, the demandant might proceed in his action, notwithstanding a plea of several tenancy. Thus if two are sued, and one of them makes default, or says nothing, the other cannot abate the writ by pleading several tenancy of parcel (c). In this case there is no difficulty in point of form in proceeding with the action, as there can be but

(b) See 41 Ed. 3. 20.

(c) 38 Ed. 3. 20. 42 Ed. 3. 8. Fitz. Several tenancy, 5. Bro. Several tenancy, 5. Statham, Several tenancy, 2.

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one plea, or issue, to be tried ; and as to the merits of the case, neither of the tenants can be injured. The one who makes no defence cannot complain if the demandant has judgment for the whole land : and as to the tenant who appears and pleads, he has as good opportunity to defend all that he claims, as if he alone had been sued for it.

The ancient books are somewhat obscure on this point ; but taking the law to be, as above stated, that when one pleads several tenancy of parcel and the other makes no defence, the demandant may proceed against the tenant who appears, we see a good reason why the party who pleads several tenancy should plead over some other matter of defence. As he has no connexion with the others who are sued with him, he may not know whether they will appear and plead, or whether, if they do appear, they will not afterwards withdraw their pleas and confess the action ; he ought therefore, in addition to his plea of several tenancy, to plead such other matter as would be proper for his defence in case he had been sued alone for the parcel of which he admits himself to be tenant. Then, if there is no other plea filed in the case, the demandant may reply to this other matter ; but if there is another plea by another tenant, as the demandant cannot answer the special matter of both of them, he must maintain his writ as before mentioned.

This rule however, as to pleading over, was not enforced in ancient times. Probably cases had not frequently occurred in which one alone appeared and pleaded several tenancy ; and in every other case the plea, if true, would in effect abate the writ. We find accordingly, that in the two cases before cited from the 38th and 42d years of Ed. 3. it was pleaded in the usual form of a plea in abatement, concluding with praying judgment of the writ, without pleading over any other matter. In 41 Ed. 3. 20, which was a *Præcipe quod reddat* against two, it was decided that each of them, after pleading several tenancy of different parcels, should be permitted to vouch ; which to this purpose is the same as pleading over. And in about half a century afterwards, in 5 Hen. 5. 4, it was

determined that the tenant in every such case *must* vouch, or plead over, and could not conclude his plea of several tenancy to the writ. The rule seems to have been considered as well settled ever since that time (*d*).

It having been determined that the tenant in such a case must plead over, or vouch, it followed that this additional plea must be good and sufficient in itself. If therefore this plea is bad, the demandant may demur to it, even in cases where he could not have traversed the plea (*e*). In the case in which this point was decided, the two tenants who pleaded several tenancy, happened to plead over in the same manner, so that the demandant could safely demur to the whole ; as the pleas were both bad. If they had pleaded different bars, one good and the other bad, the demandant probably would have been driven to maintain his writ, and could not have taken advantage of the bad plea.

In pleading several tenancy of parcel, the tenant will of course answer as to the residue ; that is, by admitting himself to hold it as supposed in the writ, and pleading accordingly, or by disclaiming, or pleading non-tenure as to that part.

When one of the tenants is defaulted, or is willing to suffer judgment by *nil dicit* or confession, and the other pleads several tenancy, the entry may be as follows :

And now the said S. though solemnly called, comes not but makes default ; and the said T. comes and defends his right when, &c. and as to parcel of the said demanded premises, to wit, a certain piece of land containing ten acres, bounded, &c. he says that he is, and on the day of the purchase of the original writ in this action

7. Plea, several tenancy as to parcel, by one, when the other is defaulted.

(*d*) In Robinson's Entries, 267, in a writ of dower against two, each pleads several tenancy of different parcels, *without pleading over* ; and non-tenure as to the residue respectively ; to all which pleas there is a general demurrer. There is no intimation of the ground of the demurrer, nor of the judgment upon it ; but as there is no other apparent objection to the pleas, the precedent, as far as it proves any thing, tends to support the opinion above expressed.

(*e*) 12 Hen. 6. 4. Thel. L. 11. c. 31. § 20.

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action was, sole tenant thereof as of freehold ; without this that the said S. has, or on the day of the purchase of the said original writ, or at any time afterwards, had, any thing in the same parcel of the said demanded premises ; and he says that he did not disseise the said D. of the said parcel of the said demanded premises as the said D. has in his writ and count aforesaid above supposed ; and of this he puts himself on the country. And as to the residue of the said demanded premises, the said T. says that he cannot render the said residue to the said D. because he says that he is not, and was not on the day of the purchase of the said original writ, nor at any time afterwards, tenant of the said residue as of freehold ; and this he is ready to verify ; wherefore, as to the said residue, he prays judgment of the writ aforesaid, and that the same may be quashed ; and for his costs.

If the other tenant had appeared and suffered judgment by *nil dicit*, or confession, the only difference would be in the beginning of the entry, as follows :

8. The like ;  
on *nil dicit*, or  
confession, by  
the other.

And now that said S. and T. come and defend their right when, &c. and the said S. says nothing in bar or preclusion of the said action of the said D. whereby the said D. remains therein undefended against the said S. (or, and the said S. says that he cannot deny the action of the said D. nor but that he the said S. did disseise the said D. in manner and form as the said D. has above thereof complained against him and the said T.) And the said T. as to parcel of the said demanded premises, &c., [as in the preceding form.]

The demandant may reply to a plea like the foregoing in the same manner as if the tenant who pleads had been sued alone for the whole land ; excepting only that in answering the *non-tenure* he will say that the said T. together with the said S. did hold, &c. as follows :

9. Replication,  
maintaining  
the writ.

And as to the said ten acres of land as to which the said T. has above pleaded as sole tenant, and whereof he has put himself on the country, the said D. thereof doth the like. And as to the said residue of the said demanded premises, whereof the said T. has pleaded non-tenure, the said D. says that his said writ ought not to be quashed by reason of any thing by the said T. above in that behalf alleged, because he says that at the said time of the purchase of his said original writ in this action the said T. was (together

with the said S.) tenant of the said residue as of freehold, as by his writ and count aforesaid is above supposed ; and this he prays may be inquired of by the country.

And the said T. likewise.

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There is no doubt that the demandant always may reply in this manner ; and it is probable that he would be required to join the issue tendered by the tenant and that a traverse of the several tenancy, in a case like the preceding, would be adjudged bad on demurrer.

In the analogous case of *entire*, or *sole tenancy*, when one of two persons sued as joint-tenants takes the entire tenancy on himself, and pleads over in bar, and the other is willing to suffer judgment by default or confession, the demandant is compelled to answer to the bar, and cannot traverse the sole tenancy ; as we shall see in the next succeeding section.

But as to the other part of the foregoing plea, to wit, the non-tenure of parcel, the demandant must answer it ; for if it should appear that the tenant is not seised of that parcel, he ought not to be injured, nor embarrassed in his defence, by the demandant's including in the writ some land which he ought not to have included. If this were permitted, the demandant might purposely include some land which he knew that the tenant did not hold. It may not however be known until after the pleadings are closed, and the issues are tried, whether T. is tenant of that parcel or not ; and therefore the demandant ought to reply in such a manner that he shall not gain an advantage from having included that land in his writ, if it should appear that it ought not to have been included. On the other hand, if the issue on the plea of non-tenure should be found for the demandant, still he cannot be injured by being required to answer to the matter in bar contained in the other part of the tenant's plea, as he is supposed to be always ready to prove the seisin, or other ground of action stated in his writ ; and to maintain his action against any bar that can be pleaded by his adversary.

When one pleads several tenancy of parcel, another may also plead several tenancy of the same, or of any



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other parcel ; and they may all join as tenants in their defence of the residue, or they may join in a plea of non-tenure as to part of the residue, and in defending the remainder. In short their pleas may vary in these respects, according to the various manners and proportions in which they may happen to hold the demanded premises ; as they are not to be injured by being improperly joined in the action, but each of them has a right to make such plea as is suited to his case. It would be useless to prepare forms for every different case that can occur. I subjoin one more, upon the following case.

A writ of entry on disseisin in the *per* is brought against T. R. and S. for a messuage, a mill, and one hundred acres of land. The disseisin is alleged to have been committed by one A. B. who demised to T. R. and S. The tenant T. claims the messuage in severalty, and has nothing in the mill. R. also claims the messuage in severalty ; and R. and S. claim the mill as held by them jointly, but in severalty from T. All three of them hold the one hundred acres of land, and intend to dispute the demandant's right to recover it.

10. Plea, by three. Several tenancy and non-tenure by different tenants as to different parcels, and general issue by all, as to the residue.

And the said T. R. and S. come and defend their right when, &c. and as to the said messuage with the appurtenances, parcel of the said demanded premises, the said T. says that he is, and on the day of the purchase of the original writ in this action was, sole tenant of the said messuage as of freehold ; without this that the said R. and S. or either of them have any thing, or on the day of the purchase of the original writ in this action, or at any time afterwards, had any thing in the said messuage : and the said T. says that the said A. B. did not disseise the said D. of the said messuage, as the said D. has above thereof in his writ and count aforesaid supposed ; and of this he the said T. puts himself on the country. And as to the said mill, parcel of the residue of the said demanded premises, the said T. says that he cannot render the said mill to the said D. because he says that he is not, and was not on the day of the purchase of the said original writ nor at any time afterwards, tenant thereof as of freehold ; and this he is ready to verify ; wherefore as to the said mill he prays judgment of the writ aforesaid and that the same may be quashed. And the said R. as to the same messuage says that he is, and on the day of the purchase of the said original writ was, &c. (*pleading several tenancy*

*in the same manner as above pleaded by T.—traversing the seisin of T. and S. and concluding with the general issue.)* And the said S. as to the same messuage says that he cannot render the same to the said D. &c. (*pleading general non-tenure, as above, and concluding with praying judgment of the writ.*) And the said R. and S. as to the said mill, parcel of the residue of the said demanded premises, say that they are, and on the day of the purchase of the said original writ were, tenants of the same mill as of freehold; without this that the said T. has any thing, or on the said day of the purchase of the said original writ, or at any time afterwards, had any thing, in the same mill: and the said R. and S. say that the said A. B. did not disseise the said D. of the said mill, as the said D. has above thereof in his writ and count aforesaid supposed; and of this they put themselves on the country. And as to all the residue of the said demanded premises, the said T. R. and S. say that the said A. B. did not disseise the said D. of the said residue, as the said D. has above thereof in his writ and count aforesaid supposed; and of this they put themselves on the country.

And as to the said messuage and the said mill, parcel of the said demanded premises the said D. says that his said writ ought not to be quashed by reason of any thing by the said T. R. and S. above in their pleas in that behalf alleged, because he says that the said T. R. and S. were on the said day of the purchase of the said original writ jointly tenants as of freehold of the said messuage and the said mill, as by his writ and count aforesaid is above supposed, and this he prays may be inquired of by the country. And as to the plea of the said T. R. and S. as to the said residue of the said demanded premises, whereof they have put themselves on the country, the said D. thereof doth the like.

11. Replication, maintaining the writ, and joining the issue as to the residue.

This form is taken chiefly from the precedent in Rast. 273; and the manner of pleading by the demandant tends to confirm the opinion expressed above, that several tenancy of parcel, even if proved, will not abate the writ as to another part, of which all the tenants admit themselves to be jointly seised. If it would have that effect, the demandant ought not to join the issue last tendered by the three tenants; but should have made one replication, in maintenance of his writ, to all their pleas, as he has done with regard to the two pleas of several tenancy. If a plea in abatement goes to the whole writ, and the issue

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which is joined upon it is found for the demandant, it is peremptory against the tenant, and the judgment is final; and on the other hand if the issue is found for the tenant, there can be no trial of any other issue, because the action wholly fails. In every view, therefore, it would be unnecessary and improper for the demandant in such a case to tender or to accept any other issue, but that which applies to the sufficiency of his writ. Accordingly in another precedent in Rast. 363, which is a Formedon against four who plead several tenancy of all the different parcels, leaving no part to which they all answer jointly; the demandant overlooks all the different issues tendered, and makes one replication to the whole, in maintenance of his writ. Considering this to be the law, several tenancy will never abate the whole writ, unless the different pleas of several tenancy embrace the whole of the demanded premises; and it will follow, that if the issue on such pleas is found in part for the demandant, and in part for the tenants; that is, if they are proved to hold jointly a part of the premises, though not the whole; the writ will be good for that part, and the demandant will have judgment to recover it; and the writ will abate for the residue.

As this plea is not strictly a plea to the writ, even in form, it would no doubt be allowed in our practice to be pleaded to the action.

The tenant, in pleading over, is not confined to the general issue, but may plead any other matter in bar, which he could plead if sued alone for that parcel of the premises. I presume he would not even be confined to such pleas as in ancient times were considered as pleas to the action, but that he may plead any matter that may be necessary or proper for his defence. For example, it is well settled that he has a right to vouch; but he might always be deprived of this privilege, if he had not also the right to plead a mistake in the entry as alleged by the demandant. In the case above supposed, upon which the preceding plea is framed, T. could not vouch any one but A. B. by whom he is supposed to have entered. If then A. B. had in truth conveyed that messuage to C.

and C. had conveyed to T. with warranty, the only mode in which T. could vouch his warrantor would be, after pleading the several tenancy, to add, that he did not enter by A. B. as alleged in the writ, but by C. The demandant would then amend his writ, or sue out a new writ, conforming to the truth of the case, upon which T. might vouch his warrantor. So if, instead of A. B., it was one F. who ousted the demandant and demised to T.; and suppose that F. had a right of entry, and a good title to the land, and that A. B. had no title to it; T. must plead that he entered by F. and not by A. B. so as to compel the demandant to amend, or to bring a new action. For if he should plead the general issue, that A. B. did not disseise, &c. it might be found against him; whereas if the supposed disseisin was rightly stated in the writ, then upon the plea that F. did not disseise, &c. the issue would be found for the tenant.

## SECTION VIII.

*Sole tenancy, or Entire tenancy.*

When two or more are sued, and one of them holds or claims the whole of the demanded premises in severalty, he may plead this sole tenancy; and then plead over any matter of defence that is suited to his case, as if he had been sued alone. This plea has a strong resemblance to the plea of several tenancy, and they will in many respects serve to explain each other. In the English practice, if the plea of sole tenancy is filed before the demandant has counted, the plea does not conclude to the writ, nor does the tenant plead over; but he concludes with praying that the demandant may count against him. If the plea is made after the count, the tenant must plead over, or vouch. This distinction cannot apply in our practice; because the count is always inserted in the original writ, and is therefore necessarily made before any appearance or plea by the tenant.

The reason why the tenant is required to plead over, is the same that is mentioned above as to the plea of sev-

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eral tenancy; that is, that he is not supposed to know what plea the other tenants will make, or whether they will make any; and if all the others should make default, or say nothing, or plead non-tenure or disclaimer, the demandant may proceed against him who pleads sole tenancy, as if he alone had been sued for the whole land (*f*). In that case the demandant in his replication will take no notice of the averment of sole tenancy, but will answer the additional matter of the plea (*g*).

In general the demandant in such a case, that is, when all the other tenants say nothing, or disclaim, &c. was compelled by the common law to accept as tenant to the writ the one who pleaded sole tenancy, and was not permitted to maintain his writ, by traversing that sole seisin. There were some exceptions to this rule, which may serve to explain the nature of the plea. Thus if the action was one in which the demandant might recover damages, he might maintain his writ, so as to recover against all those who were named as tenants; and could not be compelled to proceed against one alone (*h*). So when one disclaimed, and the other took the entire tenancy and vouched him who disclaimed, the demandant might maintain his writ; because if the issue should be found for him, it would oust the tenant of his voucher, which was always a delay and prejudice to the demandant (*i*). But in general the demandant cannot suffer any inconvenience from proceeding against one alone, when that one takes the entire tenancy, and the others say nothing, or disclaim, &c; because the same evidence which would maintain his action against all, would maintain it against any one of them; and the fruits of his verdict and judgment would be the same as if they had all appeared and made the same defence. On the other

(*f*) Fitz. Briefe, 678. After one has pleaded non-tenure, and the other has taken the entire tenancy, and the demandant has accepted him as tenant, it is the same as if the first had not been named in the writ. And see Thel. Dig. L. 12. c. 2. § 16.

(*g*) See Bro. Barre, 58. (*h*) Thel. Dig. L. 11. c. 33. § 14.

(*i*) Thel. Dig. L. 11. c. 33. § 1.

hand the tenant may in some cases suffer great injury, if his plea of sole tenancy should be traversed. If two joint-tenants are sued, and one of them disclaims, the whole estate is thereby vested in the other ; for this is a disagreement of record to the purchase made by the two (*k*). In such a case, if the other tenant pleads sole tenancy in himself, and the demandant is permitted to reply that they were jointly seised at the commencement of the action, he would prevail on that issue, and would thereby recover the land ; although the tenant, who thus pleads, has now all of the estate which both of them had originally, and may perhaps hold it by a title better than that of the demandant. It appears therefore that this plea does not always necessarily imply that the party was in fact sole tenant at the time of the commencement of the action ; but it sometimes means only that he is ready to defend the whole premises alone ; or, in the language of the books, that he takes the entire tenancy upon himself. So if a man having a right of entry into land, should take with him a friend or servant to assist him in making his entry and in retaining the possession, the party who is ousted may not know their mutual understanding, nor the views with which they entered, and he is not bound to know or regard them ; he may therefore sue them both as disseisors. Yet if in such a case the friend or servant should disclaim, (as perhaps he ought to do,) it would be unjust that the other tenant should thereby lose one half of the land. The party for whose use, and upon whose title, the entry was made ought therefore to be permitted to take the entire tenancy upon himself, and to defend his right to the whole land (*l*).

But when one pleads sole tenancy, and the others appear and vouch, or in any manner answer as tenants, the demandant cannot make any replication but in maintenance of his writ ; that is, that they were all seised jointly as supposed in his writ. He cannot reply to the several pleas of the different tenants, without tacitly admitting

(*k*) Thel. Dig. L. 11. c. 34. § 14.

(*l*) See Bro. Entre congeable 122. *Infra*, Sect. 10. Disclaimer.

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that they hold as they respectively allege; which would be not only inconsistent with his writ, but would be impossible in itself.

Our statute relating to disclaimers (*m*) will be found to have some effect upon the pleadings in this case of sole tenancy. In our practice no damages are recovered in any real action; but in all actions, real, personal and mixt, the party prevailing is entitled to his costs (*n*). The demandant ought not to pay costs to the party who disclaims, if the latter was in truth a tenant of the freehold when the action was commenced; and if that fact is found for the demandant, he is the party prevailing, and he ought to recover costs. To enable him to recover them, he is empowered by the first mentioned statute to reply to the disclaimer, that the party was in fact seised of the premises. In all cases therefore in our law the demandant may be injured, at least so far as to pay costs, when he ought to receive them, if he is compelled to admit the disclaimer and to accept as tenant to his writ the party who pleads sole tenancy. If on the other hand he is permitted, according to the above mentioned rule of the common law, to reply that the two tenants were jointly seised, he may prevent the plea of sole tenancy even when it is essential to the just defence of the party who pleads it. The only mode of reconciling these conflicting rights seems to be, to require the demandant to reply to the bar or other matter pleaded by the party who takes the entire tenancy on himself; and to permit him also, if he thinks fit, to answer the disclaimer by averring the seisin of him who disclaims. If he prevails on the first issue he will recover the land, with his costs, against the one who pleaded sole tenancy; and if that issue is found against him, the tenant will hold the land, and recover his costs against the demandant. As to the other issue, if the tenant prevails, he will recover his costs, because it now appears that he ought not to have been joined in the writ. But if the demandant prevails on this issue, and should have a verdict against him on the other, it seems more

(*m*) Stat. 1795, c. 75.

(*n*) Stat. 1784, c. 28. § 9.

difficult to decide what should be the result. On the one side it may be said that the demandant ought to recover his costs, because although he may not have so good a title to the land as the other tenant has, yet this tenant who disclaimed has admitted that the demandant had a better right than he had, and has rested his defence against the action on a point which the jury have found against him. On the other side it may be answered, that the party who disclaims has not expressly admitted that the demandant has any title, but only that he himself has none; and if neither of them has any right, the demandant, who took the first step, and brought his action without any just cause, ought to pay all the costs which he has thus unnecessarily occasioned. If this last should be deemed the better opinion, it seems unnecessary for the jury to find any verdict on the plea of disclaimer, when they find a verdict against the demandant on the other issue; as that verdict will determine the whole cause (o).

The mode here suggested, of making separate replications to the pleas of the two tenants, is not warranted by the English precedents; but some such course is rendered necessary by our statutes above mentioned respecting costs, and disclaimer. As the rights of the three parties (the demandant and the two tenants) are clearly settled by our law, it is the business of the special pleader so to state all the material facts as to secure to each party the benefit intended for him. Special pleading is nothing more than stating in logical and technical form the facts upon which the party founds his claim; and the forms of course must vary with all the successive changes in the law (p).

(o) See Fitz. Briefe 576. Assise against two. One pleads a release of the plaintiff; and the other pleads joint-tenancy with his co-defendant and a stranger. The jury found the first issue for the plaintiff, and the other for the defendant; but the judgment was against the plaintiff on account of the joint-tenancy, notwithstanding the other issue was found for him. The verdict therefore on the first issue was unnecessary; unless required as a matter of form, because the jury had been charged with it.

(p) See 1 Chit. on Plead. 215. 1 Bur. R. 319.



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When one pleads sole tenancy, and the other makes default, the form may be as follows :

12. Plea, sole tenancy by one, when the other makes default.

And now the said S. though solemnly called comes not, but makes default: And the said T. comes and defends his right when, &c. and says that he is, and on the day of the purchase of the original writ in this action was, sole tenant as of freehold of the said demanded premises; without this that the said S. has, or on the day of the purchase of the said original writ, or at any time afterwards had, any thing therein: And the said T. says that he did not disseise the said D. of the said demanded premises as he has above in his writ and count aforesaid supposed; and of this he puts himself on the country.

The only precedents that I have found of this plea are in Rastel's Entries (*q*). In the greater part of them the tenant concludes with waging his law of non-summons, or with some excuse for a default. There are only two, in which he pleads over, that he did not disseise the demandant; and a few, in which he pleads some other bar, or vouches. In all the instances of pleading in bar, except the two first mentioned, the additional matter which follows the allegation of sole tenancy, seems to be pleaded in the same form as if the tenant who pleads had been alone sued. But in those two instances, the plea "that he did not disseise," &c. is concluded with a verification, and a prayer of judgment in chief, instead of concluding to the country. There seems to be no difference in this particular between the plea of sole tenancy, and that of several tenancy; and in the latter, the tenant after pleading *non disseisivit*, concludes to the country. The additional matter thus pleaded has no effect in the cause and is not noticed by the demandant, unless when he is permitted or required to accept the one who pleads it, as tenant to his writ, as if he alone had been sued; and when that is the case, this additional matter is the only thing to be answered by the demandant, and it ought therefore to be good and sufficient both in form and in substance for the tenant's defence. From these views of the sub-

(*q*) 270, and seq.

ject, I have thought it best to conclude this plea with tendering an issue; presuming that the two precedents in Rastel are misprinted. There appears to be a mistake of the same kind in a plea of several tenancy, in Rast. 364, 5. The action is a Formedon, and the tenants severally plead over *non dedit* as to the different parcels, and conclude with a verification; whereas, in all the other cases of the like kind in Rastel, the plea concludes to the country. The difference is not perhaps very material; and if it should be thought more proper to conclude with a verification, the above form may be readily altered.

If the other tenant should appear, and suffer judgment by *nil dicit*, or confession, the entry would vary as in the case of several tenancy.

In these three cases, that is, when one pleads sole tenancy, and the others are defaulted, or say nothing, or confess the action, the only replication that the demandant can make is to the additional matter of the plea. And as to that, he may demur, or join the issue, if any is tendered, or reply, in like manner as if the party who pleads had been originally sued alone.

If either of the other parties answers as tenant, the entry will vary as in the plea of several tenancy. Suppose a writ of entry in the *post* against R. S. T. and U. Two of them, R. and S. claim the whole, as joint-tenants. T. claims the whole as sole tenant; and U. admits himself to hold jointly with the other three, as supposed in the writ, and pleads the general issue. The form would be as follows:

And now the said R. S. T. and U. come and defend their right when, &c. and the said U. says that the said A. did not disseise the said D. of the said tenements with the appurtenances, as the said D. has above in his writ and count aforesaid supposed; and of this he puts himself on the country.

And the said D. likewise.

And the said R. and S. say that they are, and on the day of the purchase of the original writ in this action, were jointly tenants as of freehold of the said tenements with the appurtenances in the writ and count aforesaid mentioned; without this that the said T. and U. or either of them, have, or on the said day of the purchase

13. Plea, by four, sole tenancy by two, the like by the third, general issue by the fourth.

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of the said original writ, or at any time afterwards, had, any thing in the said tenements with the appurtenances : and the said R. and S. say that the said A. did not disseise the said D. of the said tenements with the appurtenances as the said D. has above in his said writ and count supposed ; and of this they put themselves on the country. And the said T. says that he is, and on the day, &c. was, sole tenant as of freehold of the said tenements, &c. (*as above, traversing the seisin of R. S. and U. and concluding with the general issue.*)

14. Replication, maintaining the writ.

And the said D. says that his said writ ought not to be quashed by reason of any thing by the said R. S. and T. above in pleading alleged, because he says that the said R. S. T. and U. were on the said day of the purchase of the said original writ jointly tenants as of freehold of the said tenements with the appurtenances, as by his writ and count aforesaid is above supposed ; and this he prays may be inquired of by the country.

And the said R. S. and T. likewise.

In this case the demandant joins the issue tendered by U., because if the other issue is found for him, that verdict will bind only R. S. and T. ; but U., who did not join in their false pleas, has a right to defend his portion of the land. U. may therefore have a verdict in his favour, although it should be found on the other issue that all four of them held the land jointly. But if that other issue should be found against the demandant, the first would become immaterial ; because the writ would be already abated, so that the demandant could not have any judgment upon it.

If a stranger, having a right of entry as against the tenant, enter and oust him pending the writ, the tenant may plead this in abatement (*r*). This might happen, not only when the stranger had been disseised by the tenant, or by some one under whom the tenant entered ; but also when the estate of the tenant was defeated and destroyed by force of a condition, or in other lawful manner. Thus a lord might enter upon lands held by his villein ; and a mortgagor, paying the money on the day specified in the condition, might enter on the mortgagee ; and if an action were then pending for the land against

(*r*) See *infra*, § 23.

the villein, or the mortgagee, such entry might be pleaded in abatement. To avoid this inconvenience, the law allowed the demandant to bring his action against both of the respective parties; and if each of them should plead sole tenancy in himself, the demandant might maintain his writ by replying the special matter. The law is thus stated in the Register, 229. b. and there are several cases to the same point in the year books (*s*).

When the right of entry of the stranger arises from the fault of the present tenant, the latter cannot plead it in abatement, as we shall see, in section 23, *infra*. If therefore I convey land to A. with condition that the conveyance shall be void unless he pays me such a sum at a certain time, and he omits to pay the money, whereupon I enter, A. cannot plead that entry in abatement of a writ then pending against him.

If the action were brought against the mortgagor and mortgagee in the case above supposed, and each of them should take on himself the entire tenancy, the replication might be as follows:

And the said D. says that his said writ ought not to be quashed by reason of any thing by the said T. and S. above in their said several pleas alleged; because he says, that before the commencement of this action, to wit, on the — day of — the said T. was seised of the said demanded premises with the appurtenances, and being so seised did then grant, bargain, sell and convey the same to the said S. to have and to hold the same to him and his heirs and assigns, upon a certain condition, that is to say, that if the said T. should pay to the said S. the sum of — on the — day of — then the said conveyance should be void, and the said T. should and might re-enter on the same premises; and the said D. says that the said T. had not so re-entered on the said premises before the commencement of this action: and this he the said D. is ready to verify; wherefore he prays judgment, and that the said T. and S. may answer over to his said writ and declaration.

15. Replication, to pleas by mortgagor and mortgagee.

It is necessary to aver that the grantor, or mortgagor,

(*s*) 21 E. 3. 14. 41 E. 3. 16. 7 H. 6. 18. Fitz. Briefe, 34. Maintenance de briefe, 43. Bro. Briefe, 49. 148. 160. 183. Brownl. 153. Finch L. 260.

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had not entered before the commencement of the action; for if he had performed the condition, and thereupon entered, his entry would have wholly divested the estate and possession of the mortgagee; and the mortgagor alone would have been the tenant at the time of bringing the action.

If in the case above supposed, the mortgagee should plead that he had nothing but on condition, &c. and that the mortgagor had since entered; and if the mortgagor should answer as sole tenant, the demandant might accept the latter as tenant to his writ, and reply to his bar, as if the latter had been impleaded alone. So if the mortgagor had not entered, and should plead that he had nothing but a right of entry on condition, &c. and the mortgagee should take the entire tenancy, and plead over; the demandant might accept the latter as tenant, and reply to his bar. In the first case the mortgagee, and in the second the mortgagor, would be considered as having pleaded non-tenure or disclaimer; and the demandant might reply accordingly to the plea of the other tenant.

But the demandant cannot join a disseisor and disseisee as tenants in his writ (*t*), although the re-entry of the disseisee pending the writ will be sufficient to abate it (*u*). If however such disseisin and re-entry were by covin between the tenant and the pretended disseisee, for the purpose of defeating the action, or delaying the demandant, the latter may avoid this effect by setting forth the covin in his replication (*x*).

## SECTION IX.

### *Non-tenure.*

As every real action is brought to recover seisin of a freehold estate, which is supposed to be unjustly withheld from the demandant, it is in general a good answer for the party impleaded to say that he does not hold the demanded premises, that is, that he is not tenant of the free-

(*t*) 7 H. 6. 16. 18.

(*u*) See *infra*, § 23.

(*x*) 7 H. 6. 17.

hold (y). There are some few actions at the common law, in which from their peculiar nature this plea is not allowed ; but these actions are not in use with us.

This plea may be made as to a part, or the whole, of the demanded premises. At the common law, non-tenure of parcel of one entire thing, as of a manor, abated the whole writ ; although if two manors were demanded, non-tenure of one of them would not abate the writ as to the other. But by stat. 25 Ed. 3, stat. 5, c. 16, it was provided that non-tenure of parcel should abate the writ only for that parcel.

The plea of non-tenure may be general, or special. The latter is proper when the party impleaded has some estate in the land, less than a freehold, or some interest in, or right to use it ; as a term for years, or a right of way. In pleading a special non-tenure it is said that the party ought to show who is tenant of the freehold ; and so, in pleading non-tenure of parcel, that he ought to show who is tenant of that parcel. But in the latter case, it is not material whether the person so named is in truth the tenant or not, as the demandant cannot traverse that allegation (z) ; and the same is no doubt true with respect to the plea of special non-tenure.

In the English practice this plea always concludes to the writ ; and there seems to be no doubt that it may be so pleaded in our courts. But it is justly remarked by the Editor of Saunders' Reports (a), that this, " though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly a plea in abatement though a dilatory ; for so far from giving the demandant a better writ, the plea is, that the tenant is not

(y) 5 Mass. R. 344. 6 — 308. But see 13 Mass. R. 429, that a mortgagor of a remainder or reversion could not plead non-tenure to an action brought by the mortgagee to foreclose the right of redemption. See also 14 Mass. R. 409.

(z) Dallison, 101. In two precedents in Rast. 273. a. and 365. a. this averment is omitted ; and in two others, 363. and 440. where rent is demanded, the averment is inserted,

(a) 2 Saund. 44. n. 4.

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liable to the action in any shape, inasmuch as he does not hold the land." This therefore is properly included among those pleas, mentioned in the beginning of this chapter, which in our practice are allowed to be pleaded to the action ; and although this rule seems to have been once doubted, or overlooked (*b*), the law appears to be now perfectly settled (*c*).

There is however one particular in which this plea, and the plea of disclaimer, differ from some of the others which were formerly pleaded in abatement, and are now pleadable in bar. These two affect only the costs of the suit, and are not in any other respect material to the tenant's defence. It would seem therefore reasonable to require of the tenant to file his plea of non-tenure or disclaimer at an early stage of the suit, so that the demandant may have an opportunity to accept the premises when thus offered to him, without paying the costs of a suit unnecessarily protracted. On the other hand, if the tenant were required in all cases to file these, like pleas in abatement, at the first term, he might often lose the benefit of them for want of time to examine the demanded premises and to investigate his title. Perhaps the rights of both parties in this respect might be reconciled by providing that the tenant might make these pleas, like other pleas in bar, at any stage of the cause ; but that if they were made after the first Term, the tenant should be entitled to costs upon these pleas, only from the time when they were filed. Whether it is competent to the courts to make an order to this effect, or whether it would require the legislative authority, I do not presume to determine.

If the plea applies to the whole of the demanded premises, and is traversed by the demandant, the costs of the whole suit will follow the verdict and judgment ; and if it should be found on such an issue that the tenant held any part of the premises, the verdict as to that part would be for the demandant, who would of course be entitled to

(*b*) 11 Mass. R. 216. .

(*c*) 3 Mass. R. 312. 10—64. 13—439. 14—239.

his full costs. If the plea applies to a part only of the premises, and is traversed, and the demandant prevails on this issue he will recover his costs, although he should not maintain his action as to the residue; and so if the verdict on the plea of non-tenure as to part should be against the demandant, and he should prevail on the other issue, he will be entitled to full costs. In all these cases, the demandant is the prevailing party, though he does not recover all that he demanded (*d*). By our law costs are not taxed for every different issue or plea, but the costs of the whole suit are always awarded to the prevailing party.

I proceed to give the form of the plea, according to the English practice, which may be readily altered to a plea in bar, when required.

And the said T. comes and defends his right when, &c. and says that he cannot render to the said D. the tenements aforesaid with the appurtenances, because he says that he is not, and was not on the day of the purchase of the original writ in this action, nor at any time afterwards, tenant of the said tenements as of freehold; and this he is ready to verify; wherefore he prays judgment of the writ aforesaid, and that the same may be quashed; and for his costs.

16. Plea, general non-tenure.

In this plea it is alleged that the party was not tenant on the day of the purchase of the writ, nor at any time afterwards (*e*); both of which averments are in general necessary. There are however exceptions as to both of these points. If the tenant alienes after the purchase of the writ, this shall not abate it; but if he has been ousted by one having a better title, he may plead this special non-tenure (*f*). There is in Rast. Ent. 232. b. a plea of this kind to a writ of Dower, in which the tenant says that he had before the purchase of the writ disseised one

(*d*) 2 Pick. R. 387.

(*e*) See Doctr. Plac. 128. contra: but not supported by the book cited, viz. 37 H. 6. 16: and see the preceding sentence in Doctr. Plac. to the contrary.

(*f*) Thel. Dig. L. 12. c. 29. § 3. Infra, § 23.



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A. B. who had, since the last continuance, entered and expelled him ; and the demandant replies that the tenant did not disseise the said A. B. &c. on which the issue is joined. So, as to the other point, if after the commencement of the action the party impleaded comes to the freehold by the operation of law, as an heir by the death of his ancestor, or a reversioner by the death of the tenant for life, this does not make the writ good, and he may plead this special non-tenure (*g*). But if the party impleaded purchase the land after the commencement of the action, 'or, being a reversioner, accept a surrender from the tenant for life, he cannot plead non-tenure. So if after the commencement of the present action, he has recovered the land against the person who was then tenant, and has entered accordingly, this, being his own act, makes him a good tenant to the writ, and he cannot abate it for non-tenure (*h*).

When the plea applies only to a part of the demanded premises, the tenant must specify, and describe precisely, the part which he claims and intends to defend, and plead as to that part the general issue, or any other matter adapted to his case ; and as to all the residue of the demanded premises, he will plead non-tenure. The form may be as follows :

17. Plea, general issue to part, non-tenure to the residue.

And the said T. comes and defends his right when, &c. and as to parcel of the said demanded premises, to wit, a certain piece of land containing fifty acres, bounded, &c. he says that he did not disseise the said D. of the said parcel of the said demanded premises, as the said D. has above in his writ and count aforesaid supposed ; and of this he puts himself on the country. And as to all the residue of the said demanded premises the said T. says that he cannot render the said residue to the said D. because he says that he is not, and was not on the day of the purchase of the original writ in this action, nor at any time afterwards, tenant as of freehold of the said residue ;\* and this he is ready to verify : where-

(*g*) Thel. Dig. L. 16. c. 3. Rast. Ent. 416. a.

(*h*) Thel. L. 12. c. 30. § 10. 9 Ed. 3. 455, and see 22 Ed. 3. 8, and 41 Ed. 3. 5.

fore as to the said residue of the said demanded premises the said T. prays judgment of the writ aforesaid, and that the same may be quashed, and for his costs.

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If it is thought proper to say who is tenant of the residue, the averment may be inserted at the place of the asterisk, as follows :

—but one A. is, and on the day of the purchase of the said original writ was, tenant thereof as of freehold ; and this he is ready, &c.

The plea of special non-tenure may be of various kinds. Two examples have been already mentioned above ; and the forms of the pleas may be seen in the books there referred to (i). I subjoin a form of another kind ; which is for one who holds only as tenant for years :

And the said T. comes and defends his right when, &c. and says that long before the purchase of the original writ in this action, one A. B. was seised of the said demanded premises in his demesne as of fee ; and being so thereof seised, demised the same to him the said T. to have and to hold the same to him the said T. from the first day of April in the year — for the term of — years thence next ensuing ; by virtue of which said demise he the said T. was and still is possessed of the said premises for the term aforesaid ; and so the said T. says that he has nothing in the said demanded premises, and that he had nothing therein, on the day of the purchase of the said original writ, nor at any time afterwards, but only for a term of years in form aforesaid, the fee and freehold thereof being then and ever since in the said A. B. : and this he the said T. is ready to verify ; wherefore he prays judgment of the writ aforesaid, and that the same may be quashed ; and for his costs.

18. Plea, special non-tenure to the whole.

The particular estate or interest set forth in the beginning of the plea is not traversable by the demandant. The substance and point of the plea is that the party is not tenant of the freehold ; and his title to another kind of estate cannot be tried in this action. This result also

(i) Rast. Ent. 232. 416.

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conforms to the general rule of pleading, as laid down in Plowd. 14, and Co. Lit. 303, as to pleas in which the party states any special matter, and concludes *et sic*, "and so he says," &c. That rule is, that if the preceding statement is in the affirmative, (as here, that he was possessed of a term of years) and the conclusion, after the *et sic*, is in the negative, (as here, that he does not hold, or has nothing as of freehold, &c.) the conclusion alone ought to be traversed, and not the matter of the preceding statement.

The common replication, that the party was tenant of the freehold, is as follows :

19. Replication, that he was tenant.

And the said D. says that his said writ ought not to be quashed by reason of any thing by the said T. above in pleading alleged, because he says that the said T. on the day of the purchase of the said original writ was tenant as of freehold of the said demanded premises, (or, of the said residue of the said demanded premises) as above in the writ aforesaid is supposed ; and this he prays may be inquired of by the country.

In the English forms the day of suing out the original writ is added under a *videlicet*. This is unnecessary in our practice, because the writ makes part of the record in the action, and is constantly before the court, in the same manner as the count and the other pleadings are.

In the ancient books of Entries we find special replications to this plea of non-tenure, in which the demandant alleges that the party now impleaded disseised him, or was otherwise seised, before the purchase of the original writ, and afterwards enfeoffed certain persons to the demandant unknown, by fraud and collusion, with intent to delay the demandant and to prevent his knowing the names of the tenants or persons against whom he might bring his action ; and the demandant then avers that the party impleaded has ever since the disseisin, or ever since the feoffment, continued to receive the rents and profits to his own use. This replication was founded on the stat. 1 Ric. 2. c. 9, and on other statutes afterwards made in explanation and amendment of the first (k). All these

(k) 4 H. 4. c. 7. 11 H. 6. c. 3. 1 H. 7. c. 1.

statutes, with many others made to restrain and correct the mischiefs arising from secret uses and trusts, seem to have been virtually repealed by the statute 27 Hen. 8. c. 10, for transferring uses into possession, and by the statute 13 Eliz. c. 5, for avoiding fraudulent conveyances. This special replication is therefore no longer necessary; and the facts therein set forth may be shown in evidence to maintain the general replication (*l*).

It may often happen that the demandant will prevail on the trial of this issue, although the tenant never claimed a freehold in the premises. As, if the tenant takes a lease from one who has no estate in the land, and enters on the right owner, claiming only an estate for years; yet the owner may consider him as tenant of the freehold, and recover against him as such; for he shall not be allowed to qualify his own wrong (*m*). So if my disseisor leases to A. and I enter upon him, and A. re-enters, claiming only his estate for years, A. is a disseisor to me (*n*). And generally when a man *enters unlawfully on the right owner*, he cannot qualify his own wrong by saying that he claims only a certain particular estate, but may, at the election of the owner, be treated as a disseisor, and as having acquired the fee-simple.

## SECTION X.

*Disclaimer.*

A disclaimer, in the ancient feudal law, was a denial by the vassal that he held the feud of his lord. Upon such a denial or disclaimer, the vassal was deprived of the land, and the lord had a right immediately to resume it (*o*). In the common law there were several kinds of disclaimer, all partaking in some degree of the character of a disclaimer in the feudal law, and probably derived from it. There was a *disclaimer in the blood*, by one

(*l*) Cro. El. 234. Sav. 126. S. C. (*m*) Golds. 43.

(*n*) Dyer, 134, and see several other cases in Viner, Disseisin (I).

(*o*) Crag. jus feudale, L. 3. tit. 5. § 1, 2. Feud. Cons. L. 2. tit. 26.

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who was sued as a coparcener or co-heir by another claiming, in the like character, his share of the inheritance alleged to have descended from their common ancestor ; a *disclaimer in the seignory*, by one who was vouched to warrant lands to another, who claimed to be his tenant by homage-ancestrel, and a *disclaimer in the tenancy*, by one of whom rent or services were demanded. In all these cases the disclaimer operated in some measure as a conveyance of record ; and had the effect of a release, surrender, or other conveyance, according to the nature of the case (*p*).

From this effect of a disclaimer, it was probably afterwards introduced in various real actions, whether there was any privity of blood or estate between the parties, or not ; and here also it operated in some measure as a conveyance of the land. If two joint-tenants were sued in a writ of entry, and one of them disclaimed, this enured as a release, to pass all his estate to his co-tenant. So, if one sole tenant was sued and disclaimed ; this not only divested all his right in the land, but enured as a feoffment, or other conveyance, to vest in the demandant all the estate, if any, that the tenant had ; and the demandant might thereupon enter, although his estate had been previously discontinued, or his right of entry tolled ; and he would become seised, as far as it respected the tenant, of the estate set forth in his writ (*q*). It is this last kind of disclaimer that is the subject of this section.

The tenant, when pleading a disclaimer, was not understood to aver that he was not seised of the land ; but rather, that he was ready to relinquish it to the demandant ; and in almost every instance the tenant had, or was supposed to have, some estate in the land which he could lawfully aliene. The disclaimer was not concluded with a verification, because it contained no traversable fact ; neither did it contain any prayer of judgment for the tenant ; but it resembled in those particulars a *cognovit ac-*

(*p*) Co. Lit. 102, 103.

(*q*) See Com. Dig. Abatement, F. 15. 8 Co. 123. Co. Lit. 362, 363. 13 Mass. R. 439.

*tionem* in personal actions, rather than a plea to the action, or to the writ. In Littleton's time it is said to have become usual to add a disclaimer to a plea of general non-tenure (*r*); and in our practice, by a still further change, a disclaimer is not unfrequently pleaded *instead* of non-tenure, and is considered as having the same effect. By our statute 1795, c. 75, it is enacted that every person sued in any real action shall answer for so much or such part of the demanded premises as he holds, and may disclaim as to the residue; and if he disclaims as to the whole, "and the plaintiff cannot prove his the defendant's possession of the premises, or any part thereof, he shall recover his costs." Here this plea is obviously considered as substantially the same as a plea of non-tenure; the same replication being allowed to both, and the same result following from the verdict. The Provincial statute, 1 Geo. 2. c. 3, contained the same provision, and shows that the practice was probably the same at that time.

A disclaimer in most real actions at the common law gave to the demandant the whole that he demanded, and was as beneficial as a judgment in his favour. But in some actions the demandant, upon recovering the land, was entitled to damages; and if the tenant disclaimed in one of those actions, the demandant might reply that he was tenant of the land as supposed in the writ; as otherwise the demandant would be wrongfully deprived of his damages (*s*). By the common law no costs of suit were recovered in any action (*t*). If damages had been recoverable in all real actions, it is apparent that the plea of disclaimer would have been wholly useless, as it could never have availed the party pleading it, but in cases when he might also plead non-tenure. Damages are not recovered in any real action in our courts, but costs are given in all cases to the party prevailing in the suit; and the above mentioned statute has provided this replication to a disclaimer, in order that the demandant may not be deprived of his costs when his action has been rightly com-

(*r*) 3 Lev. 330.(*s*) Co. Lit. 362.(*t*) 2 Inst. 288.

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menced. It has been decided in our courts that a disclaimer may be pleaded to the action (*u*); and as it is settled that non-tenure may be pleaded in like manner (*x*), the former plea will be seldom, if ever, necessary in our practice.

A disclaimer may be general, or special. The latter is adopted when the party has some estate less than a freehold, or some other interest in the land, which is stated by way of protestation; and then the disclaimer is made with an express saving of the estate or interest thus set forth. A general disclaimer has a more extensive operation than a plea of general non-tenure. If the party has a reversion, or remainder, he will not be estopped, by the plea of non-tenure, to claim the land after the determination of the particular estate; because by that plea he only denies that he *now* has the freehold (*y*). But after a general disclaimer he is forever barred from asserting any title inconsistent with that set forth by the demandant; because he has relinquished every thing that is demanded against him in the writ; and the demandant is in a manner remitted to all that he claims, as if he had recovered it by a verdict on the general issue (*z*).

A general disclaimer when pleaded in abatement, is as follows:

20. Plea, general disclaimer.

And the said T. comes and defends his right when, &c. and says that he has nothing, nor does he claim to have any thing, in the said demanded premises, nor did he have, nor claim to have, any thing therein on the day of the purchase of the original writ in this action, nor at any time afterwards; but he wholly disclaims to have any thing in the said premises; and this he is ready to verify; wherefore he prays judgment of the writ aforesaid, and that the same may be quashed; and for his costs.

If the disclaimer applies only to a part of the demand-

(*u*) 13 Mass. Rep. 439.

(*x*) 3 Mass. Rep. 312. 14 Mass. R. 239. *supra*, § 9.

(*y*) See the exception in the case of a mortgage of a reversion or remainder, 13 Mass. R. 429.

(*z*) 3 Lev. 330. Co. Lit. 362.

ed premises, the tenant will first plead as to all the other parts; and then disclaim, as above, as to all the residue.

A special disclaimer may be as follows :

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And the said T. comes and defends his right when, &c. and protesting that he, on the day of the purchase of the original writ in this action and long before, was and still is seised in his demesne as of fee of a certain messuage contiguous and next adjoining to the said demanded premises, and that he the said T. and all those whose estate he has in the same messuage, from the time whereof the memory of man is not to the contrary, have had and used, and of right ought to have had and used, and the said T. still of right ought to have and use, a certain way for himself and themselves, and his and their servants and tenants, occupiers of the said messuage, to pass and repass on foot, and with carts and carriages, and with horses and other cattle, into, through, over and along, the whole of the said demanded premises, at all times of the year, at his and their free will and pleasure, as to the same messuage with the appurtenances belonging and appertaining; and saving to himself and his heirs and assigns the right of way aforesaid, he says that he has not, nor does he claim to have any thing else in the said demanded premises, nor did he on the day of the purchase of the original writ in this action, nor at any time afterwards, have nor claim to have any thing else in the said premises; and he wholly disclaims to have any thing therein excepting the right of way aforesaid; and this, &c. wherefore, &c. (*as in the preceding form.*)

21. Plea, special disclaimer.

The statement which follows the *protestando* will vary according to the nature of the estate or easement thus claimed by the party, and the title by which he claims it. This statement is not traversable by the demandant. The only replication that can be made, according to our statute above mentioned, is that the party impleaded is tenant of the freehold of the demanded premises, in the same form as to a plea of non-tenure.

When the disclaimer is pleaded to the action, the beginning and conclusion will be made like other pleas in bar: in all other respects it will correspond with the above forms. The replication will vary accordingly.



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## SECTION XI.

*That the Demandant himself is seised.*

This is pleaded in the English practice, sometimes to the writ, and sometimes to the action. It seems to be unnecessary with us ; as the plea of non-tenure, or disclaimer, will answer the same purpose in all the real actions that we have adopted from the common law.

In Coke's Ent. 224, this is pleaded as a plea of non-tenure ; that is, after the allegation, that the demandant was seised on the day of the purchase of the writ, the plea concludes with a traverse, that the party impleaded was tenant of the land on that day, or at any time afterwards. There is a case also in Fitz. Mortdancestor 40, of a mortdancestor brought by three, where two of them were summoned and severed ; and the tenant pleaded to the writ, that the third, who prosecuted the suit alone, was seised of the part that belonged to him ; and issue was joined on a traverse of that plea. But the Justices said that it would have been better pleading to have alleged non-tenure as to so much as the demandant held ; and to plead over to the points of the writ.

## SECTION XII.

*Pleas to the Count.*

Although the count is not by our law filed after the appearance of the tenant, as in the English practice, but is inserted in the original writ, yet there is no doubt that it must conform substantially to the rules of the common law relating to the action in which it is used.

There are however many pleas relating to defects in the count which have never been adopted in our practice. As, first, a *bad demand*, which is a mistake in naming the things demanded, or in the order in which they should be demanded. It is deemed necessary with us that the premises in question should be accurately described, so

that the sheriff may know of what he is to deliver seisin to the demandant, in case he recovers; and that the record may always show what piece of land has been the subject of the suit. No other attention is required in this particular. Secondly, *bis petitum*, or demanding the same thing twice; which can hardly occur, if the premises are accurately described, as required in our practice. Thirdly, *a mistake in the demand*, which cannot exist here, as the tenant never has a view of the premises demanded. Fourthly, *a variance between the count and the writ*. The form of the writ is established in every instance by our statutes, and it takes its name and character from the count which is included in it. There cannot therefore be any such variance between the count and the writ in our practice.

It is said to be a good plea in abatement to the count, that it contains two or more distinct causes of action. Such a count is undoubtedly irregular; but as the defect must in general, if not always, appear on inspection of the count, it will seldom, if ever, be necessary to plead it in abatement. In *Buckmere's case*, 8 Co. 85, the tenant demurred specially on account of a supposed defect of this kind, and there is no intimation in the report that this was not the proper mode of presenting that objection.

This rule respecting the unity of the cause of action does not prevent the demandant from claiming in the same writ several different parcels of land in the same county, provided he claims them all by the same title, and on the same ground of action (a). If the tenant has disseised my ancestor of several different tenements in the same county, I may demand them all in one writ of entry, or writ of right. So I may have one formedon for divers lands included in one original gift. So if I am disseised at the same time and by the same person of divers lands in the same county, some of which came to me by purchase, and some by descent, or some from one ancestor, and some from another; I may have one writ of entry, or writ of right, for the whole; because here the title, if it

(a) 8 Co. 85.

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may be so called, on which the action is founded, is my own seisin. But if my father and uncle were disseised, I cannot have one action for the whole ; but must demand one moiety as heir to my father, and the other moiety, in another action, as heir to my uncle. It follows of course that there never can be two counts in one writ ; although this has been sometimes practised in our courts, in cases that have passed probably without observation.

It is also said that a default of legal form in other particulars may be pleaded in abatement to the count ; as the omission to allege esplees in the person on whose seisin the demandant counts. But the proper course in such a case is unquestionably to demur, either generally or specially according to the nature of the defect. The tenant in such a case does not allege any new fact in order to show that the count is defective ; but merely points out the defects already apparent on inspection of the count.

## SECTION XIII.

*Pleas to the writ.*

Pleas to the writ, for matter apparent on the face of it, are not in use with us. The writ is always before the court, as much as the count, or any other part of the record ; and a variance from the form prescribed by the statutes, or any other like defect, may always be presented to the consideration of the court by a special demurrer. Indeed the pleas of this description have more resemblance in form to a special demurrer, than to a common plea in abatement. The tenant prays judgment of the writ, because he says that it is bad or defective, and then specifies and sets down the particulars in which it varies from the form in the Register, or from the rules which apply to such a writ (*b*).

When the exception to the writ arises from matter not apparent on the face of it, such new matter must be specially pleaded. In this class are sometimes included many

(*b*) See 3 Instr. Cler. 43. & seq. Co. Ent. 320.

of those pleas which have been considered in the preceding sections, and which are called pleas to the person of the demandant, or of the tenant; all of which are founded on facts existing at the commencement of the action. There are in the English practice several other pleas to the writ, founded on facts existing at the commencement of the action, which are not used with us. Such as that the demanded premises lie in another county; which, if true, must always appear in the writ and count, when the premises are accurately described, as required by our law. So of various mistakes as to the name of the place where the premises are situated. There is however one plea of this description, which may sometimes be found necessary or useful in our courts, and which is not wanted in England; and that is when the description of the premises demanded is defective and uncertain. If indeed the defect appears on the face of the writ and count, there can be no occasion for any special plea; but when the defect or uncertainty arises from a latent ambiguity in the description, it cannot be known to the court unless the fact which creates the ambiguity is specially pleaded. As for example, if the description be such as will apply equally well to either of two different parcels, or lots of land, in the same town; or if it refer to boundaries which have no existence in nature. Such a plea is not necessary in the English practice, because the demanded premises are not accurately described in the writ or count; and if there is any uncertainty in this particular, the tenant may demand a view. In our practice, in the case here supposed, if the tenant should not discover the defect in season to plead it in abatement, he may perhaps protect himself against any inconvenience by giving an accurate description of the land which he claims, and pleading non-tenure or disclaimer, as to all the residue; and if the demandant should reply that there is no such residue, still the plea will not injure the tenant.

The plea of another action depending for the same cause, is not peculiar to real actions. All the remaining pleas which are founded on matter existing at the suing out of the writ, are pleas to the action of the writ, and

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not to the form of it. They are intended to show that the demandant has misconceived his action ; and that although he may have some title to the land, yet he ought not to recover it in the present action. Many exceptions of this kind in personal actions are in modern times considered as grounds of demurrer or nonsuit (c) ; and the same principle would probably be adopted in real actions ; so that these defects when not apparent on the record, and when material to the just defence of the tenant's title, might be pleaded to the action, as well as to the writ (d). As to those mistakes and defects which cannot injuriously affect the tenant, it would perhaps still be thought proper that they should be pleaded in abatement, if pleaded at all.

I proceed to those pleas to the action of the writ, which may be necessary or useful in our practice.

## SECTION XIV.

*Mistake of the demandant's title. Plea of Darrein seisin.*

The pleas to the action of the writ, which may be admitted or required in our courts, are founded on a mistake of the demandant, which may occur in six different particulars: as in setting forth, 1st. his own title, 2d. the descent to himself, 3d. the demise stated in the writ, 4th. the estate of himself, 5th. the estate of the tenant, and, 6th. the manner of the tenant's entry.

It is a general rule that in every writ of entry on the seisin of an ancestor, the demandant should state truly the person who was last seised, and trace the descent from that person to himself. This seisin and descent constitute his title. The seisin therefore of the demandant himself, or of any ancestor, after that one on whose seisin the writ is founded, which is called a *darrein seisin*, shows that the demandant has not correctly stated his own title. This *darrein seisin*, if pleaded *with tille*, is a plea

(c) 1 Chit. on Plead. 442.

(d) See Vin. Abatement (Y. a.) pl. 10, 11. Bro. Briefs, 409. 488.

in bar; if *without title*, it was in ancient times a plea in abatement. It is with title, when it contains an averment of a feoffment, or other conveyance from the person who is said to have been thus seised; or when a title is in any way deduced from that person, as in the case of a sister holding as heir of her brother, against her brother of the half blood who claims as heir of his father. But *darrein seisin* with title seems never to have been a proper plea in a writ of entry; because the later seisin, if true, falsified the writ, and therefore the demandant could never traverse the title set forth in the plea. His only replication would be in maintenance of his writ (e); and therefore the tenant's title, if introduced into the plea, would become immaterial, and the plea would be nothing more in effect, than the common *darrein seisin* without title. The plea of *darrein seisin* without title can seldom, if ever, be essential to the tenant's defence. I proceed to give one form of such a plea, to the writ; which can be readily altered to a plea in bar, if required.

And the said T. comes and defends his right when, &c. and says that after the death of the said G. the grandfather of the said D. mentioned in the writ and count aforesaid, one F. who was the only child and heir of the said G. and the father of the said D. (or, the said F. [if he has been named in the writ] entered into the said demanded premises as heir of the said G. and was thereof seised in his demesne as of fee; in which case the said D., if he has any cause of action in this behalf, ought to have had a writ of entry upon the seisin of the said F. to recover the said demanded premises against him the said T. and this he is ready to verify; wherefore the said T. prays judgment of the writ aforesaid, and that the same may be quashed; and for his costs (f).

22. Plea of  
Darrein seisin.

I have found no precedent for this plea in any of the books of entries; but the above seems to include all that can be necessary. It is said that this plea cannot be pleaded in a writ of right; and that when pleaded in Formedon, it should conclude to the action, and not to the

(e) See Com. Dig. Abatement (L. 1.) (M.)

(f) See 33 H. 6. 7—19—50.

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writ. There seems to be some confusion in the ancient books on this subject. It can hardly be of much importance in our practice ; but the reader who may wish to examine it further is referred to Theloal's Digest, L. 11. c. 40, and the books there cited ; and to 8 Co. 88, Buckmere's case.

The replication to this plea would be as follows :

23. Replication, that the other ancestor was not seised.

And the said D. says that his said writ ought not to be quashed by reason of any thing by the said T. above in pleading alleged, because he says that the said F. was not seised of the said demanded premises at any time after the death of the said G. as the said T. has above in his said plea alleged ; and this he the said D. prays may be inquired of by the country.

## SECTION XV.

### *Mistake of the descent.*

This plea, as a plea to the writ, seems to be adapted principally, if it is not entirely confined, to the writs of Right and of Formedon ; and even in those actions it seems to have been pleaded sometimes in bar, and sometimes in abatement (*g*). In the 12 Ed. 2, it was held to be no plea to a writ of *dum non fuit compos mentis* (*h*) ; and there seems to be no reason for rejecting it in that action, but what would apply equally in all the other writs of entry. In the case last cited the action was brought by one R. as uncle and heir of the non compos person, and the plea, which was adjudged bad, was that R. had an elder brother who survived the non compos ; but it was considered that the plea would have been good, if it had contained an averment that the elder brother had been seised of the estate, (which would have been a case of *darrein seisin*) or that he was still living, or that he had released, or had been attainted of treason or felony. Either of these three last averments would

(*g*) See 8 Co. 87, Buckmere's case. Thel. Dig. L. 11. c. 50. 10 E. 3. 520. Bro. Droit 30. 47.

(*h*) Thel. Dig. L. 11. c. 50. § 16. Fitzh. Entre 70.

have made it a good bar to the action ; and the first would have made it a good plea to the action of the writ, and in modern practice to the action itself. If the elder brother had been seised of the estate, (which must be understood of a lawful seisin, of the estate which the non compos had before the conveyance) that would have avoided the conveyance on which the present action was founded ; and the demandant must have brought his action on the seisin of that elder brother, and set forth the disseisin to him, or the other means, whatever they were, by which the tenant afterwards obtained possession. Either of the other three averments would show that the demandant could not recover in any form of action. If the elder brother had released, it would of course bar all who should claim by or under him ; and if he were still living, or had been attainted, no one could claim as his heir.

This plea and the rules relating to it apply only when the descent is traced through a collateral ancestor, and not to the case of a lineal descent. For example, in an action founded on the seisin of a grandfather, the omission of the father in tracing the descent would be fatal ; because the right could not by possibility come to the demandant unless through the father. But as this defect would appear on the writ and count, the tenant might take advantage of it by a special demurrer, and there would be no occasion for any plea (i). So it would be, if the descent were in any other respect so incorrectly or imperfectly stated as not to show that the demandant is heir to the person under whom he claims. But in the case of a collateral ancestor, the omission would not always appear on the writ. In the case last cited from 12 Ed. 2, the land *might* have descended immediately from the non compos to the demandant ; and it *would* have so descended, if there had not been an elder brother of the demandant, who survived the non compos. The descent is well traced, so far as it appears in the writ and count ; and if the elder brother had never held the estate, nor done any act to bar or defeat the demandant's title, the

(i) See 3 Bos. and Pul. 453.



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omission of his name in tracing the descent could not produce any injury or inconvenience to the tenant. The tenant therefore could not take advantage of the omission, unless he could add some further averment, of the kind above suggested, which would show that the demandant could not recover in the action, and so make it a good plea in bar.

A form of this plea will be found in chapter XIV. § 2, pl. 8.

## SECTION XVI.

*Mistake of the Demise.*

This plea has some resemblance to the plea of a mistake of the entry; and is never applicable to a writ of entry on disseisin, unless when it shows a mistake of the entry, and is pleaded as such. The reader is therefore referred to pleas of *mistake of the entry*, section XVIII. of this chapter; and to chapter VII. section II. for pleas of mistake of the Demise, in other actions.

## SECTION XVII.

*Mistake of the Estate, of the demandant, or tenant.*

If the demandant brings an action of a higher nature than his estate allows, or of a kind not adapted to his estate, this mistake of the estate, as it was called, might be pleaded to the action of the writ: as if a tenant in tail, or tenant for life, should bring a writ of right on his own seisin; or if an heir in tail should bring a writ of right or a writ of entry, on the seisin of his ancestor. It is understood of course that the demandant in these cases claims an estate in fee-simple in the usual form; for if the mistake appears on the face of the writ or count, as if the demandant in a writ of right counts on his own seisin in tail, or for life, the tenant may demur, or the court may *ex officio* abate the writ (*k*).

(*k*) Vin. Abatement (A.) Hob. 199. 279.

This plea, like most, if not all, of the others that were formerly pleaded to the action of the writ, may now as I apprehend be pleaded in bar. The plea, if true, is a perpetual bar to the action in which it is pleaded, and shows that the demandant has not such a title as that which is stated in the writ and on which the action is founded.

If this defect or mistake should appear in evidence under the general issue, it would probably in some cases produce the same effect; that is, the demandant would be nonsuited, or the verdict would pass against him. As if in proving his title in a writ of entry *cum titulo*, he should find it necessary to produce a deed of conveyance to his ancestor; and if that conveyance were of an estate in tail, it would no doubt be decided that this evidence did not maintain his action. There are many cases in the ancient books in which similar mistakes or defects, which were then considered as the proper subject of a plea to the action of the writ, were nevertheless held to abate the writ, if they appeared in a special verdict upon any other plea (*l*).

This plea, or ground of defence, does not however, as I apprehend, apply to every mistake or defect that may occur in stating the demandant's estate; but to such only as show that he cannot maintain the action in this form. In a writ of entry on a disseisin to the demandant himself, it would not, I presume, be a good plea to say, that he was seised only for life, when he counted of an estate tail, or that he was seised in tail, when he counted of an estate in fee-simple; because if he was actually seised of either of those three estates, he might maintain a writ of entry against his disseisor, and all who claim under him (*m*). The plea therefore in this case would not show that the action is misconceived; and would not be a good plea to the action of the writ.

The plea of a mistake of the demandant's estate will be found among the pleas in bar, in chapter IV. § 7.

(*l*) Com. Dig. Abatement (E. 15.) Cro. El. 143. 1 Leon. 315. S. C.

(*m*) See *supra*, Chap. II.

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A mistake of the estate of the tenant was also a good plea at common law in certain actions ; as in a writ of waste, of *cessavit*, of ward of land, and others (*n*). This plea could never be made in a writ of entry, nor in a common writ of right ; unless the plea of special non-tenure, when the tenant claims an estate for years, &c. may be considered as coming within this description. The only action now in use with us, in which the tenant can plead this mistake of his estate, as the plea was commonly understood, seems to be the action of waste.

## SECTION XVIII.

*Mistake of the Entry.*

In every writ of entry there are two points to be considered, in stating the manner of the tenant's entry into the land. One is, to ascertain who was first seised by force of the defective title under which the tenant is supposed to hold ; and the other is, the intermediate conveyances, or descents, or the intermediate holders of the estate, if any, between the person so first seised and the present tenant ; all which intermediate holders, if the writ is within the degrees, should be correctly set forth. Suppose for example, as to the first point, that A. having a good title, and a right of entry, ousts the demandant, and then conveys the land to the present tenant ; but in the writ it is said that the tenant has no entry but by one B. who demised the same to him, and who thereof unjustly disseised the demandant. Now it is obvious that if the tenant pleads the common bar or issue, viz. that the said B. did not disseise, &c. he may fail in his defence, although he has a good title to the land ; because he cannot show that B. had any right of entry. He should therefore plead that A. entered upon the demandant, and that the tenant entered by A. and not by B., and when he has thus compelled the demandant to amend his writ, or to purchase a new one, conforming to the truth of the case,

(*n*) Theil. L. 11. c. 53.

he may on the general issue, "that A. did not disseise," prove A.'s right of entry; and he will then prevail in the suit.

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A mistake of the second description can seldom, if ever, be injurious to the tenant in our practice; but still he may always insist on having the writ made to conform to the truth of the case, without showing that he is exposed to any particular inconvenience by the mistake. The loss of his voucher is of little importance in our courts, as the tenant never really recovers over in value against the vouchee. This is the reason given for the plea, when any one of the intermediate holders of the estate is omitted in the writ; and also for the plea that the writ is in the degrees, when it ought to have been in the *post*. But even when this reason did not apply, and when the mistake was of the opposite character, viz. the inserting the name of one who never had any thing in the premises, the common law still allowed the tenant to plead the mistake. If indeed the one who had nothing is alleged in the writ to have held jointly with another, which other was in fact seised, it has been decided that the tenant cannot plead in abatement that he entered by one of them alone (*o*). But if, in tracing the estate into the hands of the tenant, it is said that he has no entry but by R., to whom S. demised it, it has been adjudged a good plea to say that he entered by the said S. and not by R.; although it was admitted that the tenant was not deprived of his voucher by this mistake in the writ (*p*). So if the writ is in the *post* when it ought to have been within the degrees, the tenant may plead the mistake; though it does not impair his right to vouch, but on the contrary gives him a greater latitude in that respect than he would have been entitled to, had the entry been truly stated.

The pleas of this description may be conveniently presented in the order of the writs of entry on disseisin to which they are respectively applicable; taking in each case, first, the plea of a mistake as to the supposed disseisor, and secondly, the mistakes as to the degrees, or

(*o*) 44 Ed. 3. 31.

(*p*) 44 Ed. 3. 39. Fitz. Entre 53.

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the intermediate holders of the estate. These pleas will be found to be applicable, with few alterations, to all the other writs of entry.

When the writ is in the *quibus*, that is, on a disseisin supposed to have been committed by the tenant, as in the writ No. 1. *supra*, Chap. 2, the tenant may plead that he entered in some other manner, and traverse the entry supposed in the writ; as follows:

24. Plea, to writ in the *Quibus*, that it ought to be in the *per*.

And the said T. comes and defends his right when, &c. and says that one A. having a good title to the said demanded premises, to hold the same to him and his heirs forever, and having a lawful right of entry thereinto, did enter into the same upon the possession of the said D. thereof, and did expel and amove the said D. therefrom, as he lawfully might; and the said A. afterwards demised the said premises to him the said T.; without this that he the said T. entered into the said premises upon the possession of the said D. thereof, as the said D. has above in his said writ supposed; in which case the said D., if he has any cause of action in this behalf against him the said T., ought to have prosecuted the same by a writ of entry in the *per*, and not by his writ aforesaid; and this he is ready to verify; wherefore he prays judgment of the writ aforesaid and that the same may be quashed; and for his costs (q).

I have not met with any case in which a plea of this kind has been made; but the tenant may undoubtedly plead such a mistake of the entry, as otherwise he might not only be deprived of his voucher, but he might lose the land, although he had the better title to it. If the tenant should admit the writ to be good, and should plead the general issue, the demandant, upon proving his seisin, would be entitled to a verdict, unless the tenant could show that he had a right to enter and amove him; but in the case supposed the tenant cannot prove this, because A. had that right, and it was one which he could not lawfully assign. It is therefore necessary to the tenant's defence that the writ should be abated, or amended in this particular. The tenant might indeed plead this matter in bar, *giving colour*, as it is called, to the demandant; but

(q) See Rast. Ent. 422. 569. 3 Inst. Cler. 120.

in such a plea he must admit certain facts alleged in the declaration, which in the case supposed are not true, and which might possibly operate to his prejudice on some other occasion. Suppose for example he should set forth the title and entry of A. and the demise to himself, he must then admit that the demandant afterwards claiming *by colour*, &c. entered upon the tenant, who re-entered on the demandant, as he lawfully might, &c. although these two last facts are not true. The tenant, according to the ancient rules of pleading, could not plead any matter in bar inconsistent with the writ, which he had already admitted to be good; and therefore in the last mentioned case he must admit the seisin of the demandant and the subsequent entry by himself. If this plea of a mistake of the entry should be allowed in our practice to be pleaded in bar, (as I apprehend it would be) there would be no necessity for giving colour; and the only alteration in the above form would be in the beginning and conclusion of the plea, to make it a plea in bar.

It is unnecessary in the above plea to set forth specially the title of A. because it is not traversable. If A. actually entered, claiming the land under whatever title it might be, and demised to the tenant, that is *prima facie* sufficient to abate the writ. But as it is possible that the demandant might have afterwards re-entered, and then have been ousted by the tenant, according to the allegation in the writ, the plea concludes with a traverse of such entry by the tenant.

The tenant, though he *denies that he entered* upon the demandant, does not directly *traverse the disseisin* complained of; because that would be a waiver of his exception to the writ. Such a traverse would amount to the general issue, thereby admitting that the tenant entered in the manner supposed in the writ, and denying that such entry was wrongful; or, in other words, asserting a right of entry in himself, whilst in the case supposed, A. alone had such right of entry.

If the writ in the above case ought to have been in the *per and cui*, the tenant, instead of stating a demise to himself by A. will say,

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25. Plea, that  
the writ ought  
to be in the  
*per and cui*.

—that one A. having a good title, &c. did enter, &c. as he lawfully might; and the said A. afterwards demised the said premises to one B. which said B. afterwards demised the same to him the said T. without this, &c.

—and at the conclusion he will say that the writ ought to have been in the *per and cui*. In all other respects the plea will be like the preceding.

If the writ ought to have been in the *post*, the plea will vary according to the facts on which it is founded. If there had been a third alienation or descent, the tenant, after stating the title and entry of A. as before, may say,

26. Plea, that  
the writ ought  
to be in the  
*post*.

—and the said A. afterwards demised the said premises to one B. and the said B. afterwards demised the same to one C. which said C. afterwards demised the same to him the said T. without this, &c.

—and conclude that the writ ought to have been in the *post*.

If there had been more than three demises, as for example by C. to E. and by E. to the tenant, in the preceding case, still the tenant must not state specifically more than three, as that would make his plea double. In such a case, therefore, after stating the demise to C. as in the preceding form, he will say,

—and afterwards he the said T. entered into the said demanded premises; without this, &c.

In all the above pleas in this section, the tenant admits the seisin alleged by the demandant; and is supposed to be prepared, when the action is brought in a proper form, to show a better title, and a right of entry in the person who is named in the plea as having ousted the demandant. But it may be that the demandant never was seised; in which case, as there could not have been such an entry as alleged in the writ, so neither could there have been any disseisin; the tenant therefore, if he would plead this mistake in the entry, should do it if possible without admitting the seisin of the demandant. Such a

plea must of course show that the writ ought to have been in the *post*; because it can never be within the degrees, unless the tenant, or some person, by or under whom the tenant holds, did enter upon the demandant. If there was no such ouster of the demandant, it must follow, either that the tenant can trace his title back through three or more descents or alienations of persons by and under whom he holds, or secondly, that the tenant himself, or some person within those three degrees under whom he holds, has upon a recovery or otherwise entered upon some stranger. In either case, the action, if any can be maintained by the demandant, must be in the *post*.

I have not met with any plea of this kind; but as it may be essential to the just defence of the tenant, I presume it would be allowed, and venture to propose the following form :

And the said T. comes and defends his right when, &c. and protesting that the said D. never had any thing in (or, never was seised of) the said demanded premises in manner and form as he has above in his writ and declaration aforesaid alleged, *for plea*, says that heretofore, to wit, on the — day of —, one A. was seised of the said demanded premises in his demesne as of fee, taking the profits, &c. and afterwards the said A. demised the same to one B. and the said B. afterwards demised the same to one C. which said C. afterwards demised the same to him the said T. without this that he the said T. entered thereinto upon the possession of the said D. thereof, as the said D. has above in his said writ supposed; in which case the said D. if he has any cause of action in this behalf against him the said T. ought, &c.

27. Plea with *protestando*, that the writ ought to be in the *post*, on account of three demises.

If the reason assigned for requiring the writ to be in the *post*, is a recovery or ouster by the tenant, or by one under whom he holds, the preceding form will be readily altered by reference to pleas No. 42, 43, and 44, in this chapter.

The replication would be the same to each of the four preceding pleas, to wit, by taking issue on the traverse, as follows :

And the said D. says that his writ aforesaid ought not to be quashed by reason of any thing by the said T. above in his said

28. Replication, maintaining the writ.



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plea alleged, because he says that the said T. did enter into the said demanded premises upon the possession of the said D. thereof, as the said D. has above in his said writ supposed; and this he prays may be inquired of by the country.

If the writ is in the *per*, alleging a disseisin by A. who demised to the tenant, when in fact the tenant himself entered upon the demandant and ousted him, the plea would be as follows :

29. Plea, to writ in the *per*, that it ought to be in the *quibus*.

And the said T. comes and defends his right when, &c. and says that after the said supposed disseisin committed by the said A. he the said D. was seised of the said demanded premises; and the said T. having a good title to the said premises to hold the same in his demesne as of fee [or, freehold, &c.] and having a lawful right of entry thereinto, entered into the same upon the possession of the said D. thereof, and expelled and amoved the said D. therefrom as he lawfully might; and thereupon became and ever since has been seised of the said premises in his demesne as of fee (or, freehold, or, in tail, &c.) without this that he the said T. entered into the said demanded premises by the said A. as the said D. has above in his said writ supposed; in which case the said D. if he has any cause of action in this behalf against him the said T., ought to have prosecuted the same by a writ of entry in the *quibus*, supposing that the said T. had disseised him the said D. of the said premises, and not by his writ aforesaid; and this, &c. wherefore, &c.

If the writ is in the *per and cui*, or in the *post*, when it ought to be in the *quibus*, the plea will be the same as the preceding.

The above pleas are all founded on a mistake as to the supposed disseisor. If the disseisor is rightly named in the writ, yet if the estate is not properly deduced from him to the tenant, the latter may plead this mistake of the entry; which is the second of the two classes into which these pleas are above divided.

If the writ is in the *per*, when it ought to be in the *per and cui*, the plea will be as follows :

30. Plea to writ in the *per*, that it ought to be in the *per and cui*.

And the said T. comes and defends his right when, &c. and says that he entered into the said demanded premises by one B., to whom the said A. demised the same, and not by the said A., as in

the writ aforesaid is supposed ; in which case the said D. if he has, &c. ought to have prosecuted the same by a writ of entry in the *per and cui*, and not by his writ aforesaid ; and this, &c. wherefore, &c.

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If it ought to be in the *post*, on account of another alienation, the plea will be as follows :

—and says that the said A. after the said supposed disseisin demised the said demanded premises to one B. who afterwards demised the same to one C. which said C. afterwards demised the same to him the said T., and the said T. thereupon entered into the said premises by the said C. and not by the said A. as in the writ aforesaid is supposed ; in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry in the *post*, &c.

31. — that it ought to be in the *post*.

If there were one or more demises between C. and the tenant, the plea will not specify them, but after stating the demise to C. will proceed as follows :

—and afterwards he the said T. entered into the said premises, without this that he entered thereinto by the said A. as in the writ aforesaid, &c.

Or the plea may omit the demise to C., provided it shows in any other way that any person by whom the tenant entered, was seised after B. ; as follows :

—and says that the said A. after the said supposed disseisin demised the said demanded premises to one B. and afterwards he the said T. entered thereinto by one C. and not by the said A. as in the writ aforesaid, &c.

This last form would serve for either of the two preceding cases ; and it is immaterial whether C. (in the last plea) entered on a demise by B., or on a demise by any intermediate holder, or on an ouster, or recovery ; because if A. demised to B. and then C. was seised before the tenant entered, the writ must be in the *post*.

The replication in maintenance of the writ will take issue on the traverse in each of the above pleas, viz :

And the said D. says that his writ aforesaid ought not to be abated, &c. because he says that the said T. did enter into the said

32. Replication, maintaining the writ.

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demanded premises by the said A., as he the said D. has above in his said writ alleged; and this he prays may be inquired of by the country.

If the writ is in the *per and cui*, when it ought to be in the *quibus*, the plea will be like pl. 29, supra. If it is in the *per and cui*, alleging that the tenant has no entry but by B. to whom A. demised, when in fact A. demised to the tenant, the plea may be as follows:

33. Plea, to the writ in the *per and cui*, that it ought to be in the *per*.

—and says that he entered into the said demanded premises by the said A. and not by the said B. as in the writ aforesaid, &c.

and conclude that the writ ought to have been in the *per*.  
If it ought to have been in the *post*, he will say,

34. — that it ought to be in the *post*.

—that he entered into the said demanded premises by one C. and not by the said B. as in the writ aforesaid is supposed; in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry in the *post*, &c.

In this last case, it is unnecessary to state that B. demised to C. because the writ itself shows that the estate, after the supposed disseisin, had passed through two hands before it came to the tenant; which fact he virtually admits; if therefore any other person had also held the estate before it came to the tenant, the writ must necessarily be in the *post*. The plea would be in the same form if B. had demised to E. and E. to C. or if there had been more intermediate demises before that by C. to the tenant. The knowledge of those demises is not necessary to enable the demandant to sue out a better writ; because if there have been more than two demises after the first disseisin, the demandant need not mention any of them, but must take his writ in the *post*.

The replication to the two last pleas will be as before, "that the tenant did enter by B.," &c. concluding to the country.

If the writ had been as in the case last supposed, when in fact A. had demised to C. and C. to B. and B. to the tenant, the plea might be as follows:

—and says that the said A. did not demise the said demanded premises to the said B. as in the writ aforesaid is supposed, in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry in the *post*, and not, &c.

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35. —that it  
ought to be in  
the *post*.

In 9 Ed. 3. 480, it was objected to a plea in this form that the tenant ought to have said to whom A. did demise, if not to B. But the plea was held good; because it shows, if true, that the writ ought to have been in the *post*; so that the demandant may have a good writ, without knowing any thing further of the intermediate demises. It is stated in the writ, and admitted by the tenant, that A. first had the estate, and that B. afterwards had it and demised to the tenant; if therefore any other person had it between A. and B. it would make more than two demises, and the writ must be in the *post*. But if no other person had held the estate between A. and B. still if A. did not demise to B. the writ must be in the *post*; because if B. entered immediately *after* A. but not *by* A. he must have entered by disseisin, abatement, recovery, or in some other manner that would be in the *post* as it respects the demandant. The Reporter adds a "*mirum*" at the end of this case; but there appears to be no reason to doubt the correctness of the decision. Thelol (r) cites it, without any mark of reprobation; and quotes another case from Fitz. Briefe, 817, which is to the same effect.

The replication to the preceding plea may be, "that the said A. did demise the said demanded premises to the said B. as the said D. has in his said writ alleged," and conclude to the country.

If however the mistake were such as to show that the writ ought still to be within the degrees, the tenant ought to state specially all the successive demises; as otherwise he would not enable the demandant to sue out a better writ. Suppose for example that the writ had stated the entry as in the case last supposed, but in fact A. had de-

(r) L. 11. c. 54. § 9.

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mised to C. and C. to the tenant, the plea would be as follows :

36. — that tenant entered by a different person, to whom, &c.

—and says that the said A. after the said supposed disseisin demised the said demanded premises to one C. which said C. afterwards demised the same to him the said T. and the said T. thereupon entered into the said premises by the said C. and not by the said B. as in the writ aforesaid is supposed ; in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry, supposing that he the said T. had no entry into the said premises but by the said C. to whom the said A. demised the same, and not by his writ aforesaid ; and this, &c. wherefore, &c.

The replication in maintenance of the writ would, as in the former cases, tender an issue on the traverse of the entry.

It would be unnecessary and unsafe in this case, for the demandant to traverse the demise by A. to C., which is set forth in the plea ; because though there had been such a demise, still the writ might be good. A. might have demised to C., and afterwards taken back the same estate, and then have demised to B. ; in which case the demandant might maintain the writ in its present form, although he might also, at his election, have had his writ in the *post* (*s*). But if it be true, as alleged in the plea, that the tenant did not enter by B. the writ must be bad. The latter averment therefore is the one on which the demandant ought to take issue.

It will be observed that the *demise*, mentioned in a writ of entry, includes a descent from ancestor to heir, as well as a feoffment, or any other kind of lawful conveyance. I have used the word in the same latitude in these pleas. But if it should be thought better, the pleader can in every instance substitute the averment of a descent for that of a demise. The plea in the last preceding case might be altered as follows :

37. — showing a demise by descent, instead of by alienation.

—and says that the said A. after the said supposed disseisin died seised of the said demanded premises in his demesne as of fee,

(*s*) Co. Lit. 239. 2 Inst. 154.

after whose decease the same premises descended to one C. as the only child and heir of the said A. and the said C. thereupon entered into the said premises and became thereof seised in his demesne as of fee, and afterwards died so seised thereof, after the decease of which said C. the said premises descended to him the said T. as the only child and heir of the said C. and he the said T. thereupon entered into the said premises by the said C. and not by the said B. as in the writ aforesaid is supposed ; in which case, &c.

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If the writ is in the *post*, alleging that the tenant has no entry but after the disseisin committed by A. when in fact A. had demised to the tenant, the plea may be as follows :

—and says that the said A. after the said supposed disseisin demised the said demanded premises to him the said T. and the said T. thereupon entered into the said premises by the said A. in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry in the *per*, and not by his writ aforesaid ; and this, &c. wherefore, &c.

38. Plea, to writ in the *post*, that it ought to be in the *per*.

It was held in 7 Ed. 3. 24. (322.) that the demandant in replying to a plea of this description must show specially why his writ should be in the *post*, by stating two demises between the first disseisor and the tenant ; and that it is not sufficient to reply that A. did not demise to the tenant. This case is cited with apparent approbation by Thelol, L. 11. c. 54. § 22, but I have not been able to perceive any good reason for the decision. The tenant admits the writ to be good, but for the fact stated in his plea ; and it would therefore seem sufficient for the demandant to traverse that fact. But however this may be, it is obvious that the demandant ought not to be confined to such a traverse, but must always be permitted to plead the two other demises ; because it may be true that A. demised to the tenant, and that the tenant afterwards demised to B. and B. to C. and then C. to the tenant again ; in which case the writ might be maintained in the *post* ; although the demandant might, if he thought proper, have had a writ in the *per*.

The form of such a replication would be as follows :

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39. Replication, that two others were seised, between A. and the tenant.

—because he says that after the said disseisin by the said A. committed as aforesaid, one B. was seised of the said demanded premises, and after him one C. was seised of the same premises, so that he the said D. could not have had a writ of entry in the *per* for the recovery of the said premises against him the said T. as the said T. has above in his said plea alleged; and this he the said D. is ready to verify; wherefore he prays judgment if his writ aforesaid ought to be quashed, and that the said T. may answer over thereto.

As this replication does not necessarily contradict the plea, nor traverse any fact alleged by the tenant, it is proper to conclude it with a verification.

The demandant need not state how B. and C. entered, or in what manner they acquired the estate, because he is not presumed to know the demises on the part of the tenant, when there are more than two, but may always in such a case bring his writ in the *post*. So if there had been three or more persons seised between A. and the tenant, the demandant might select any two of them, to be named in this manner in the replication, which would still be in the same form. The demandant could not, however, in any case name more than two, because that would make the replication double; as the seisin of any two between the disseisor and the tenant will maintain his writ in the *post*.

The tenant, in rejoining to this replication, may traverse the seisin of either of the two persons therein named; but not of both of them; because this would make the rejoinder double.

The rejoinder may be as follows:

40. Rejoinder. And the said T. says that the said B. was not seised of (*or, never had any thing in*) the said demanded premises, as the said D. has above in his said replication alleged; and of this he puts himself on the country.

If the writ is in the *post*, when it ought to have been in the *per and cui*, the only difference in the plea will be, to state that A. demised to B. and B. to the tenant, and conclude that the writ ought to have been in the *per and cui*.

The replication also will be like the former; excepting that it will allege the seisin of one person only, instead of two. As the tenant in his plea admits that there were two demises, the demandant by showing that there was one more, will maintain his writ in the *post*.

Such a replication may be as follows :

—because he says that after the said disseisin by the said A. committed as aforesaid, one C. was seised of the said demanded premises, so that he the said D. could not have a writ of entry in the *per and cui* for the recovery of the said demanded premises, &c.

41. Replication, to plea that it should have been in the *per and cui*.

If the writ is in the *post*, when it ought to be in the *quibus*, the plea will allege the entry of the tenant, as in pl. 29, above in this chapter.

In all the above pleas which show that the writ ought to have been in the *post*, the reason assigned for it is that there were more than two demises between the supposed disseisor and the tenant. But we have before seen that there are other facts which require the writ to be in the *post*; and when such a case occurs the plea must be varied accordingly.

Suppose for example that the writ alleges the entry of the tenant *by* A.; when the tenant, claiming under an adverse title, had entered *upon* A. and expelled him; the plea would be as follows :

—and says that before the said A. had any thing in the said demanded premises, he the said T. had a good title to the said premises, to hold the same in his demesne as of fee [*or, as in fee-tail, or, as of freehold*] and had a lawful right of entry thereinto, and afterwards, and whilst the said A. was seised of the said premises as in the writ aforesaid is supposed, he the said T. still having such title and right of entry as aforesaid entered into the said demanded premises upon the possession of the said A. thereof, and expelled and amoved the said A. therefrom, as he lawfully might; without this that he the said T. entered into the said demanded premises by the said A. as in the writ aforesaid is supposed; in which case the said D. if, &c. ought to have prosecuted the same by a writ of entry in the *post*, and not, &c.

42. Plea, that it ought to be in the *post*, because tenant ousted A. and did not enter by him.

The tenant alleges that his title and right of entry ac-



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crued before the supposed disseisin, in order to show that he did not claim under the person named as disseisor.

If any third person had thus entered upon A. and afterwards demised to the tenant, the plea would be varied as follows :

43. — a like  
ouster by B.,  
who demised  
to the tenant.

—and says that before the said A. had any thing in the said demanded premises, one B. had a good title to the said premises, and had a lawful right of entry thereinto, &c. (*stating that B. entered and expelled A. as in the preceding plea*) as he lawfully might ; and afterwards the said B. demised the said premises to him the said T. without this that the said T. entered thereinto by the said A., &c.

If the tenant in the case last supposed did not enter by B. but by some other person, or upon recovery, or ouster of B. or of some other, he should not state that fact specially ; because the ouster by B. is sufficient to cause the writ to be in *post* : he may therefore, after stating the entry of B. as above, say—“ and afterwards he the said T. entered into the said premises, without this that he entered thereinto by the said A.” &c. This form would also answer even if he did enter by B.

If the writ had been in the *per and cui*, stating that the tenant had no entry but by F., to whom A. demised, the tenant may plead in like manner an entry upon F., taking care still to allege that the title, under which he holds the estate, accrued before that of the supposed disseisor.

If this entry had been made upon a person not named in the writ, but who was seised after A., the supposed disseisor, the tenant might still plead the entry according to the fact ; as follows :

44. — ouster  
of a stranger,  
by a stranger.

—and says that before the said A. (*the supposed disseisor*) had any thing, &c. one B. had a good title to the said demanded premises, to hold the same, &c. and had a lawful right of entry thereinto ; and afterwards, and after the said supposed disseisin committed by the said A. the said B. still having such title and right of entry as aforesaid, and finding one G. in possession of the said premises entered thereinto upon the possession of the said G. thereof, and expelled and amoved the said G. therefrom, as he lawfully might ; and the said B. afterwards demised the same to the said T., &c.

The replication, as in all the other like cases, would affirm that the tenant entered as alleged in the writ, and tender an issue on the traverse contained in the plea.

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If the tenant, or the person under whom he holds the premises, entered after the original disseisin by abatement, intrusion, or recovery, or as successor, or as tenant by the curtesy, the plea will be varied accordingly.

There is one other plea of a mistake of the entry, which is peculiar to the case of husband and wife, when they are sued as tenants. If the woman was seised before the coverture, and the husband has no title but by the marriage, the writ ought to state that *she* has no entry but, &c.; but if the estate came to the wife by descent or purchase during the coverture, the writ should state that *they*, the husband and wife, have no entry but, &c.; for a feme covert could not make such an entry without her husband (*t*).

The plea showing a mistake of the first description may be as follows :

—and say that at the time of the intermarriage between the said T. and S. he the said T. found the said S. seised of the said demanded premises; without this that they the said T. and S. entered therein by the said A. as in the writ aforesaid is supposed; and this they are ready to verify: wherefore, &c.

45. Plea, by husband and wife that he found her seised, &c.

This seems to have been the form of the plea, as far as we can judge from the language of the Year Books. It would perhaps correspond better with the style of modern pleadings to say “that before and at the time of the intermarriage between the said T. and the said S. she the said S. was seised of the said demanded premises; without this, &c.”

In 13 Ric. 2. abridged in Fitz. Briefe, 647, it is mentioned as having been formerly decided that a plea of this kind was not good without traversing that the husband and wife entered as supposed in the writ; and in 33 Ed. 3. (Fitz. Briefe, 914,) it was decided that a corresponding traverse was necessary in a plea alleging that the

(*t*) Bro. Enter in the *per*, &c. 12. 7 H. 4. 17.

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husband and wife entered together. Before those cases such pleas seem to have been sometimes made without the traverse, and then the replication was "that the said T. did not find his wife seised, &c." (u). It seems clear that the plea ought to conclude with such a traverse, according to the general rule, that the tenant when pleading that he entered in another manner, should always traverse the entry as alleged in the writ. The replication therefore, as in other like cases, would take issue on the traverse; to wit,

46. Replication.

—that the said T. and S. did enter into the said demanded premises by the said A. as the said D. has above in his said writ alleged; and this he prays may be inquired of by the country.

If the estate came to the wife during the coverture, and the writ states that *she* had no entry but, &c. the plea would be as follows:

47. Plea, by husband and wife, that *they* entered by A., &c.

—and say that after the intermarriage between the said T. and S. they the said T. and S. entered into the said demanded premises by the said A. without this that she the said S. entered therein whilst she was sole, (or, before the said intermarriage,) as in the writ aforesaid is supposed; and this, &c. wherefore, &c.

In stating in the writ a demise made to a feme covert, we must distinguish between a demise which is the foundation of the action, and which could not be made without a feoffment or other like conveyance; and a demise which only makes a degré, and which may be either by descent or by purchase. In the latter case the writ should state that the husband and wife had no entry but by A. (the disseisor, abator, &c.) who demised the same to *her*. But in the former case, as for example in a *Dum fuit infra ætatum*, on a demise by the ancestor of the demandant to the feme covert, the writ should state that the husband and wife have no entry but by F. the father of the said D. whose heir he is, who whilst he was under age demised the same to *them*. In 46 Ed. 3. a writ of this kind is said to have been abated because the demise

(u) See 28 Ed. 3. 99. pl. 38.

was alleged to have been made to the wife. This case is not reported in the Year Books, and we have only a short abridgment of it, in Fitz. Briefe, 777. If it was in the *post* (x), it seems that the writ might have been maintained; or at least that it was not abateable of course; because the husband and wife would not in that case be said to have entered *by* the person who made the demise; and it might therefore have been made to the woman before the marriage, and the estate after sundry mesne conveyances might have come to her again after the marriage (y). But still this case tends to show the general opinion that when a feoffment, or other like conveyance, is made to a feme covert, it must be alleged in pleading to have been made to the husband and wife; (to wit, to them and the heirs of the wife;) according to the rule laid down in 7 Hen. 4. 17. A feme covert cannot accept a feoffment to herself without the assent of her husband; and by such assent the estate vests immediately in both of them; that is, in the husband as of freehold, and in the wife as of fee.

In all the above pleas in this section, the writ is supposed to have been founded on a disseisin to the demandant. If the writ is founded on the disseisin of an ancestor or predecessor of the demandant, the pleas will be substantially the same; varying only the traverse, to meet the entry as alleged in the writ. I subjoin one plea of that kind, on the following case, for the purpose of showing also how to plead that the tenant entered as by abatement. The writ is brought on a disseisin of F. the father of the demandant; and the real ground of defence is that F. was seised only for his life, with remainder to the tenant, and that F. died seised, and then the tenant entered. Now if the tenant admits that he entered as alleged in the writ, he must fail in the action, because he had no right of entry on F. He must therefore state his entry according to the fact, and conclude that the writ ought to have been in abatement, as follows:

(x) See Thel. L. 11. c. 54. § 45, where this case is cited.

(y) See Thel. L. 11. c. 54. § 41.

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48. Plea, that  
the writ ought  
to have been  
on abatement.

—and says that after the death of the said F. he the said T. having a good title to the said demanded premises, to hold the same to him and his heirs for ever, and having a lawful right of entry thereinto, and finding the said premises wholly unoccupied and the possession thereof vacant, entered into the same as he lawfully might, and thereupon became and ever since has been seised thereof in his demesne as of fee ; without this that he the said T. entered into the said demanded premises upon the possession of the said F. thereof, as the said D. has above in his said writ supposed ; in which case the said D., if he has any cause of action in this behalf against him the said T. ought to have prosecuted the same by a writ of entry, supposing that the said T. abated into the said premises after the death of the said F., and not by his writ aforesaid ; and this, &c. wherefore, &c.

There are other cases of a mistake of the entry, in which the pleas will be readily framed by reference to the preceding forms, and to the books of entries. For example if the tenant, or any one under whom he claims, entered upon the supposed disseisor or any one holding under him, by intrusion, judgment, succession, or as tenant by the curtesy, the writ ought to be in the *post* ; although there should not have been more than two persons seised after the alleged disseisin (*z*). So if the disseisor dies seised, and leaves two sons, and one of them has issue and dies, the writ, if brought against the uncle and nephew, must be in the *post* (*a*). And if the land descends to his two children, C. and D., and D. dies unmarried and intestate, by which his moiety descends to C. ; it seems that the writ for the whole will lie against C. in the *post*.

## SECTION XIX.

### *Death of the Demandant, or of one of the Demandants.*

By the common law the death of the demandant, or of one of the demandants, after the commencement of the action, abated the writ ; and the law was considered to be the same in this State (*b*). It is now provided by

(*z*) 2 Inst. 153.

(*a*) 2 Inst. 154.

(*b*) 11 Mass. Rep. 56.

our statute 1826, c. 70, that the writ in a real action shall not be abated by the death, marriage, or other disability, of the demandant; but if a sole demandant die, or be disabled to prosecute the suit, his heir, or such other person as would, in case the writ were abated, be entitled to commence the like action, either alone, or jointly with the former demandant, may on motion be admitted to prosecute the suit accordingly. And if one or more of several demandants die or be disabled, the heir, or other person interested as above mentioned, may be admitted to prosecute the suit jointly with the other demandants; and if there is no such motion to be admitted, made at the next term after the event, or within such further time as the court shall order, the other demandants may prosecute the suit for so much of the premises as may then belong to them. The court is further authorized to allow such amendments of the pleadings, and such suggestions on the record, as the case may require.

The heir of a deceased demandant cannot be admitted under this statute, unless he could have commenced the like action himself. If therefore a writ of entry be brought by a tenant in tail on a disseisin committed to himself, the heir in tail cannot prosecute the suit, because on such a disseisin of his ancestor he must have brought a formedon, and not a writ of entry. So if the demandant claimed an estate for his own life, the reversioner or remainder-man cannot prosecute the suit; because he would claim a different estate and by a different title, and could never have brought an action on the seisin of the tenant for life. But if a woman demandant marries, whether she claimed in fee-simple, fee-tail, or for life, her husband may be admitted to prosecute the action jointly with her (c). So if a demandant should become insane, his guardian would be allowed to prosecute the suit for him, whatever might be the nature of his estate.

(c) For the entries in case of the marriage of the demandant, see *infra*, § 22.

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If the demandant should leave two or more heirs, I presume that any one of them might be admitted to prosecute the suit alone for his share, in case the others refused or neglected to join. Either one of them might originally commence and maintain the like action alone for his share, by force of our statute 1785, c. 62 ; and if it should be objected that the heir thus admitted would prosecute the suit for a part only of the demanded premises ; it may be answered that the statute (1826, c. 70,) speaks of *the like* action, and not *the same*. This case would be substantially the same as that provided for by a subsequent clause of the statute, when one of several demandants dies, and his heir does not come in and join in the suit, in which case the survivors are allowed to prosecute it for their shares.

If the demandants are joint-tenants, and one of them dies, the survivor would be allowed to prosecute the suit for the whole. The statute provides not only for the heir, but for *any other person* who might commence the like action. So if the demandants were coparceners, and the survivor is sole heir of the deceased, he may prosecute the suit for the whole.

The admission of an heir or other person under this statute resembles in some respects that of a reversioner who is admitted to defend a suit, on the default of a tenant for life (*d*). I have therefore prepared the following forms, with reference to the proceedings and entries in that case.

49. Motion, or prayer to be admitted as heir, on the death of a sole demandant.

And now A. H. of — Esquire, comes here into court and says that after the commencement of this action, to wit, on the — day of — now last past, the said D. the demandant in this action died ; and he further says that he the said A. H. is the only son and heir of the said D. and this he is ready to verify : wherefore he prays that he may be admitted to prosecute this suit to recover his seisin of the said demanded premises against him the said T. And he is admitted accordingly. And thereupon the said T. comes and defends his right when, &c. and says that he did not disseise the

(*d*) See *infra*, Chap. IV, § 8.

said D. in manner and form as in the writ and declaration aforesaid is above alleged, and of this he puts himself on the country.

And the said A. H. likewise.

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In the preceding entry, it is supposed that the demandant died before the tenant had made any plea; in which case he would proceed, on the admission of the new demandant, to plead any matter adapted to his case, as if there had been no such change. If there had been any pleadings, both parties I presume would be required to abide by them, unless the court should upon sufficient cause shown allow an amendment.

And now A. H. of — comes into court and says that after the commencement of this action, to wit, on the — day of — the said D. the demandant in this action died; and he further says that from the said D. the right to the said demanded premises descended to his two children and co-heirs, that is to say, the right to one undivided moiety thereof to S. H. one of the children and co-heirs of the said D. and the right to the other undivided moiety thereof to him the said A. H. the other of the children and co-heirs of the said D.; and this he the said A. H. is ready to verify: wherefore he prays that he may be admitted to prosecute this suit for his said undivided moiety of the said premises against the said T. And he is admitted accordingly.

50. Motion by one, of two co-heirs, to be admitted.

In the preceding entries it is supposed that the tenant does not deny either the death of the demandant, or that the applicant is his heir. It is obvious however that unless both of those allegations are true, the person applying has no right to be admitted; and of course the tenant must have a right to traverse them. In the case above mentioned, of the prayer of a reversioner to be received, the other party is allowed to counterplead the receipt; and the pleadings may terminate in an issue of fact, or law, as in common cases. There will probably be few cases under this statute in which there would be any doubt as to either of these two facts; and if there should be any question as to either of them, it might generally be settled in a summary manner by the court, upon



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affidavits, or the examination of witnesses (*e*). If however either party should prefer to have a trial by jury ; or if the court should refuse to try the question without a jury, as it is said they may do in all cases of this kind (*f*) ; there seems to be no objection to allowing a counterplea, like that to the prayer of a reversioner.

The counterplea denying that the applicant is heir, may be as follows :

51. Counter-  
plea, that he  
is not heir.

And the said T. says that the said A. H. ought not, by reason of any thing by him above alleged, to be admitted to prosecute this suit ; because he says that he the said A. H. is the son of one J. S., and not the son of the said D. as he has above in that behalf alleged ; and of this he the said T. puts himself on the country.

This plea may be varied, like the pleas to an original action brought by one as heir ; for which the reader is referred to Chap. IV. § 6.

The counterplea denying the death of the demandant, may be as follows :

52. Counter-  
plea, denying  
the death of  
the demand-  
ant.

And the said T. says that the said A. H. ought not, by reason of any thing by him above alleged, to be admitted to prosecute this suit ; because he says that the said D. is in full life, and not dead, as the said A. H. has above thereof alleged ; and of this he puts himself on the country.

The death of the demandant having been expressly alleged in the motion, or prayer to be admitted, and being directly traversed in the counterplea, it is proper that the latter should conclude to the country (*g*).

If either of the above issues should be found for the party who prays to be admitted, it would be followed by an order for his admission, as follows :

(*e*) See the proceedings in dower, on a trial by the court, of the issue on the death of the husband. Rast. Ent. 228. Benl. 86. Dyer, 185.

(*f*) Bro. Trials, 60. 21 Hen. 7. 40. 2 Rol. Abr. 573. pl. 9. 10.

(*g*) See infra, Chap. XVI. § 2. as to plea denying the death of the husband, in an action of dower.

It is therefore considered and ordered by the court here, that the said A. H. be admitted to prosecute this suit for the said demanded premises (or, for the said undivided moiety of the said demanded premises) against the said T. And thereupon, as to the plea of the said T. by him above pleaded, alleging that he did not disseise the said D., and whereof the said T. has above put himself on the country, he the said A. H. now doth the like.

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53. Order of court for admitting the heir.

The latter part of the preceding entry is on the supposition that the tenant had previously pleaded the general issue, but that the issue had not been joined by the original demandant. That part of the entry will vary according to the state of the proceedings at the time of the demandant's death. If there had been an issue joined, the parties would proceed to trial, or if there had been a verdict, the court would proceed to judgment; unless in either case the state of the action should be such as to require some alteration or amendment of the record.

If either of these issues should be found for the tenant, the order of the court would be, "that the said A. H. be not admitted to prosecute this suit;" and thereupon such further judgment would be rendered, or such proceedings had, as might be required by the state of the action as between the tenant and the original demandant; and in like manner as if the motion to be admitted had never been made.

If the motion is made by the heir of one, out of two or more demandants, it may be as follows:

And now A. H. of —, comes into court, and says that after the commencement of this action, to wit, on —, the above named D., one of the demandants in this action died; and he further says that he is the nephew and heir of the said D., to wit, the son of one B. who was the brother and heir of the said D., and this he is ready to verify: wherefore he prays that he may be admitted to prosecute this suit jointly with the said E., the other of the said demandants, to recover their seisin of the said demanded premises against the said T. And he is admitted accordingly.

54. Motion, as heir of one of the demandants.

The motion by the surviving demandant, when they claimed as joint-tenants, may be as follows:

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55. Motion, as  
surviving joint-  
tenant.

And now the above named S., one of the demandants in this action, says that since the commencement of this action, to wit, on ———, the said D., the other of the said demandants, died; and the said S. further says that from the said D. the right to his undivided moiety of the said demanded premises accrued and belonged, by the right of survivorship, to him the said S. as having been joint-tenant thereof with the said D., and having survived him; and this he the said S. is ready to verify: wherefore he prays that he may be allowed to prosecute this suit against the said T. for the whole of the said demanded premises.

By a surviving coparcener, as follows:

56. — as sur-  
viving copar-  
ceners.

And now the above named R. and S., two of the demandants in this action, say that since the last continuance of this action, to wit, on ———, the said D. the other of the said demandants, died; and the said R. and S. further say that from the said D., for that he died without issue of his body, the right to his undivided third part of the said demanded premises descended to the said R. and S. as the brothers and heirs of him the said D., and this they the said R. and S. are ready to verify: wherefore they pray that they may be allowed to prosecute this suit against the said T. for the whole of the said demanded premises.

After the death of one of the demandants, if no motion is made for the admission of his heir, or other person interested, at the next term, or within such further time as the court shall allow for that purpose, his death may be suggested on the record, with an order that the surviving demandants may prosecute the suit alone; as follows:

57. Suggestion  
of the death of  
one of the de-  
mandants, and  
order that the  
other prosecute  
alone.

And now the said E., one of the demandants in this action, says (or, gives the court here to understand and be informed) that since the last continuance of this action, to wit, on ———, the said D., the other of the said demandants, died; and this he is ready to verify; and the said E. prays leave to prosecute this action alone, to recover his undivided moiety of the said demanded premises against the said T. And the said T. does not deny the said allegation; (or, And it appears to the court here that the said D. is dead, as the said E. has alleged;) it is therefore ordered by the court here that the said E. may prosecute this suit alone against the said T. for the said one undivided moiety of the said demanded premises.

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*Death of the Tenant, or of one of the Tenants.*

The death of a sole tenant always abated the writ; and the death of one, out of two or more tenants, generally produced the same effect. It seems, however, that where one of two tenants died and the other took the whole estate by survivorship, the action might proceed against the survivor for the whole (*h*).

Our late statute 1826, c. 70, mentioned in the preceding section, provides that when there are two or more tenants in any real action, and one or more of them shall die after the commencement of the suit, the same may be prosecuted against the surviving tenant or tenants for so much of the demanded premises as they then hold or claim. This is in accordance with the spirit of our statute 1795, c. 75, by which a demandant was allowed to commence and maintain his action against any one or more of the persons seised of the land; and the tenant could not plead joint-tenancy or coparcenery with another tenant not named in the writ; but was required to answer for so much as he held.

Two or more tenants cannot be sued jointly, unless they are joint-tenants, or coparceners. In the former case, on the death of one, the whole accrues to the survivor, and the suit may be prosecuted against him alone. In the case of coparceners, if the deceased tenant leaves no issue, his share descends to the survivors, or to some of them, and the suit may be prosecuted against the survivors for the whole; but if any other person is his heir, the suit will, by our late statute, proceed against the surviving tenant, or tenants, for so much only as they then hold.

(*h*) There have been different opinions on this point; but this seems to be the better opinion. See the cases in Com. Dig. Abatement (H. 35.) and Thel. Dig. L. 12. c. 2. 2 Mass. Rep. 479.

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Upon the death of one, out of two or more joint-tenants, the entry may be as follows :

58. Suggestion of the death of one of the joint-tenants.

And now the said D. says (or, gives the court here to understand and be informed) that since the commencement (or, since the last continuance) of this action the said S., one of the said tenants died ; and the said D. further says that the said T. was joint-tenant with the said S. of the whole of the said demanded premises, and upon the death of the said S., the said T. became and still is sole tenant of the whole of the said premises ; and this he the said D. is ready to verify : wherefore he prays leave to prosecute this suit against the said T. for the whole of the said demanded premises.

Upon the death of a coparcener, when his share descended to the surviving tenants, the suggestion would be varied as follows :

59. — of the death of one coparcener, and prayer to prosecute against the survivor for the whole.

— and the said D. further says that the said S. and T. were seised of the said tenements with the appurtenances in their demesne as of fee as children and co-heirs of one R. deceased ; and that from the said S., for that he died without heir of his body issuing, his undivided moiety of the said tenements with the appurtenances descended to the said T. as the brother and heir of the said S., and this he the said D. is ready to verify : wherefore he prays leave to prosecute this suit against the said T. for the whole of the said tenements with the appurtenances : And he is allowed to prosecute the same accordingly.

If there were three or more coparceners, and the share of the deceased descended to one alone of the survivors, the action might still be prosecuted against all the survivors for the whole of the demanded premises. Suppose for example that the action were brought against an uncle, U. and his two nephews, S. and T. being brothers, and that S. dies without issue, his share would descend to his brother T. ; and the entry might be as follows :

60. — of the death of one coparcener, whose share descended to one of the surviving tenants.

— the said S. one of the said tenants, died ; and the said D. further says that the said S., T. and U. were seised of the said demanded premises in their demesne as of fee as co-heirs of one R., deceased ; to wit, the said U. as one of the sons and co-heirs of the said R. was seised of one undivided moiety of the said premises, and the said S. and T. as children and co-heirs of one F.,

who was the other son and co-heir of the said R., were seised each of one undivided fourth part of the same premises; and from the said S., for that he died without issue of his body, his said undivided fourth part of the said demanded premises descended to the said T. as brother and heir of the said S.; and this he the said D. is ready to verify; wherefore he prays leave to prosecute this suit against the said T. and U. for the whole of the said demanded premises.

If the deceased coparcener left issue, to whom his share descended, the action would be prosecuted against the surviving tenant, or tenants, for their shares; and the entry might be as follows:

And the said D. says that since the commencement of this action, to wit, on ———, the said S., one of the above named tenants, died, &c.; and this he is ready to verify: wherefore he prays leave to prosecute this suit against the said T. and U., for three undivided fourth parts of the said demanded premises.

61. — of the death of one coparcener, and prayer to prosecute against the survivors for their shares.

Suggestions of any material fact cannot in general be entered on the record, when the fact is denied by the adverse party; because there is no proper mode of trying it upon such a suggestion. But as the statute above mentioned expressly enacts that upon the death of one tenant, the action may be prosecuted against the survivor, the demandant must have a right to allege and prove that fact. I have accordingly concluded the suggestion with an averment; and presume that it may be traversed in like manner as similar averments in the preceding section are traversed.

The point however is of less importance in this case than in that of the death of a demandant. If judgment is rendered against two tenants, after the death of one of them, it would still be good against the survivor, for all that he then held; including not only his original portion, but all that came to him from the deceased co-tenant. Such a judgment would indeed be erroneous, as it respected the deceased party, and might be reversed on a writ of error by his heir; unless his heir was the surviving co-

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tenant (i). But the co-tenant would be estopped to bring a writ of error. He could not assign for error a fact, which if known, and duly pleaded, would not have prevented the judgment against him. If any person other than the surviving co-tenant were heir of the deceased, such heir might by a writ of error reverse the judgment as to the share held by the deceased; but the original demandant would lose only the costs of the writ of error; and as to the land, he would be in the same situation as if his suggestion had been admitted.

I have not thought it necessary in any of the motions or suggestions in this, or the preceding section, to adopt the form of a plea *puis darrein continuance*; because the statute does not require the application to be made at the next term after the death of the party. The death may occur so short a time before the session of the court, that the motion cannot be conveniently made at that term; the time for making it is therefore left in all cases in the discretion of the court.

## SECTION XXI.

*Death of a stranger, or other event which determines the estate of the Demandant.*

The death of a stranger, or other like event, which occurs pending the action, cannot generally be pleaded, unless when it takes away the whole cause of action; and in that case the plea, according to the modern practice, need not be in abatement, but may be pleaded in bar of the further maintenance of the action (k). This ground of defence will therefore be considered in the succeeding chapter, of pleas in bar, § 4.

(i) See 5 E. 4. 7. Fitz. Judgment 47. Bro. Trespass 309.

(k) 1 Chit. on Plead. 445. 635.

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*Coverture, and other acts of the party.*

It has been formerly settled in our courts, in conformity with the common law, that the marriage of the demandant, or of one of the demandants, would abate the writ (1); and upon the same principle a divorce from the bonds of matrimony would no doubt have had the like effect. It is now provided by the statute 1826, c. 70, which is mentioned above in the 19th section of this chapter, that the writ shall not be abated by the marriage, nor by any other disability of a demandant. If a single woman is demandant, and marries pending the writ, her husband may on motion pursuant to this statute be admitted to join with her in the suit; whether she sued alone, or jointly with others: and in the latter case if the husband does not seasonably move to be admitted, the other demandants may prosecute the suit alone for their shares. So if a husband and wife sue in her right, (either alone, or jointly with other demandants) and they are divorced pending the writ, the wife may on motion be allowed to prosecute the suit in like manner as if she had been a feme sole when it was commenced.

If a sole demandant is married pending the action, the entry may be as follows:

And now the said D. says, that since the commencement of this action, to wit, on the — day of — she the said D. was lawfully married to A. B. of — Esquire; and this she is ready to verify: wherefore she the said D. and the said A. B. her husband pray that he may be admitted to prosecute this suit jointly with her the said D. to recover seisin of the said demanded premises against the said T. And he is admitted accordingly.

62. Motion, to admit the husband of a sole demandant.

If there were two or more original demandants, the entry may be varied as follows:

And now the said E. and D. say that since, &c. to wit, on — she the said D. was lawfully married to A. B. of —; and this they

63. — to admit the husband of one of the demandants.

(1) 4 Mass. R. 659. 10 Mass. R. 179.



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the said E. and D. are ready to verify : wherefore they the said E. and D. and also the said A. B. pray that he the said A. B. may be admitted to prosecute this suit jointly with his said wife D. and with the said E. to recover seisin, &c.

If a demandant were divorced after the commencement of the action, the entry may be as follows :

64. Suggestion of a divorce, and motion that the wife may prosecute alone.

And now the said D. says that since the commencement of this action, to wit, on the — day of — at the Supreme Judicial Court begun and held on the day last aforesaid at B. within and for the county of S. (or, to wit, at the present term of this same court,) she the said D. was by the decree of the Justices of the same court divorced from the bond of matrimony with the above named A. B. her late husband, as by the record thereof in the same court remaining more fully appears ; and this she is ready to verify by the said record : wherefore she prays that she may be allowed to prosecute this suit alone against the said T. to recover seisin of the said demanded premises.

. The fact of the marriage or divorce may be traversed, and would be tried in like manner as the alleged death of a demandant, under this same statute ; for the forms in which case the reader is referred to section 19 of this chapter. The counterplea of the divorce would be, that there is no such record of a decree of divorce, and would conclude with a verification, and not to the country.

The resignation or removal of a demandant suing as a sole corporation, as for example, of a Minister claiming in right of his parish, would destroy his whole cause of action ; and would therefore be properly pleaded in bar of the further maintenance of the action (*m*). The same effect would follow from any other act of the demandant, by which his estate is determined.

A disseisin, or entry, by the demandant pending the writ, is pleadable in abatement at the common law. This resembles very much the plea that the demandant was seised at the time of commencing the action (*n*), and also the plea of non-tenure (*o*) ; and if those may be pleaded

(*m*) See Thel. Dig. L. 12. c. 17. § 4, 5.

(*n*) Supra, sect. 11.      (*o*) Supra, sect. 9.

to the action in our courts, it is probable that this may be pleaded in like manner; that *is*, in bar of the further maintenance of the action (*p*). The demandant by such an entry or disseisin effectually destroys his cause of action, by putting it out of the power of the tenant to restore to him the land which is the subject of the suit. Forms of this plea, when pleaded *after the last continuance*, will be found in Rast. Ent. 107 and 365; and when pleaded *pending the writ*, that is before any other plea filed, in Rast. Ent. 30. The entry of the demandant, to have this effect, must be an entry with intent to claim the land and to keep possession of it; for if he enters upon the invitation of the tenant, or to examine the buildings, or to show them to a jury, &c. this will not abate the writ (*q*). Entry into parcel of an entire thing, as a manor, would abate the writ for the whole; but if twenty acres were demanded in the writ, an entry into one, claiming only that one, would not abate the writ for the remaining nineteen acres.

The demandant in his replication may deny that he entered as alleged in the plea, or may allege that the tenant has since re-entered on him.

For pleas in bar of this description the reader is referred to Chap. IV. § 3.

### SECTION XXIII.

#### *Entry, or Recovery, by a stranger against the tenant, after the commencement of the action.*

As the action must be originally brought against the tenant of the freehold, so if after its commencement his seisin was lawfully defeated or determined, the writ was generally abated. If the tenant holds under a defective title, as upon a disseisin committed by himself, or by some one whose estate he has, and pending the writ the

(*p*) See 35 Hen. 6. 13, and 37 Hen. 6. 2, that this may be pleaded to the action. Fitz. Assise, 22. Bro. Assise, 14.

(*q*) Plow. Com. 92.

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disseisee enters upon him, either with or without a judgment, the estate of the tenant is lawfully defeated, and he cannot render the land to the demandant. So if he had only a particular estate which is determined by its own limitation; as if he held for the life of another, and *cestuy que vie* dies pending the writ, and the reversioner or remainder-man enters (*r*). So if he had an estate on condition, and the condition is performed pending the writ, whereby his estate is determined; as if the land were mortgaged to him, and pending the writ the mortgagor pays the money at the day appointed, and thereupon enters. But if the estate of the tenant depended on a condition to be performed by himself, and the condition is broken pending the writ, and the feoffor thereupon enters, it is said that this shall not abate the writ; as if the feoffment were on condition that the feoffee should pay a certain rent, or a sum in gross, and pending the writ he refuses to pay the money and thereby loses his estate (*s*). So if he forfeits the estate by the breach of a condition in law; as if a tenant for life alienes in fee pending the writ, and he in the reversion enters for the forfeiture; it has been thought that the writ is not abated, and that the reversioner may, notwithstanding his entry, be *received* to defend as reversioner upon the default of the tenant (*t*). If the law were otherwise it would enable the tenant by his own act to defeat an action which was originally well commenced against him; and thus to take advantage of his own wrong.

In the case above cited, from 15 Ed. 4, 5, it was contended, in pursuance of this principle, that the tenant could not plead that before the commencement of the action he had disseised one A., who had re-entered upon him pending the writ; because this would be to allege, and take advantage of, his own wrong. But it was answered by Littleton, that in that case the writ would not be abated by any act done by the tenant after the commencement of the action; but by the entry of the disseisee

(*r*) 15 Ed. 4. 5.      (*s*) 15 Ed. 4. 5.

(*t*) Thel. Dig. L. 12. c. 29. § 1.

by force of his older title. Upon this distinction, which seems to be highly reasonable, it would probably be considered, in the cases above supposed of a forfeiture by the tenant for breach of a condition in deed or in law, that if the forfeiture took place before the commencement of the action, and the feoffor, or reversioner, entered pending the writ, it would be abated. As the tenant cannot abate the writ by a lawful conveyance of his estate made after the commencement of the action (*u*), so he ought not to be permitted to abate it by any other act after the commencement of the action, whether lawful or unlawful, which may in its consequences deprive him of his estate in the land. And on the other hand, if a stranger at the commencement of the action had a better title than the tenant, whether that title were derived from the act of the tenant, or in any other manner, and if the stranger accordingly entered and expelled the tenant, the writ according to the rules of the common law might be abated.

There is another case in which the tenant may make this plea, although he had an absolute estate in the land, and a good title to it, when the action was brought. That is, when he had been vouched in another action, and judgment had been rendered against him for a recovery in value before the commencement of this action, and pending this writ the demanded premises had been taken in execution of that first judgment (*x*). This case cannot occur in our practice, because there is not any recovery in value upon a voucher in our courts. But perhaps the same principle would apply when the land is taken to satisfy an execution, according to our laws, upon any judgment for debt or damages.

(*u*) After such an alienation, if the demandant recovers, the feoffee has no remedy, by writ of right, nor in any other manner: but if the original tenant reverses the judgment for error, as he may, (if it is erroneous) notwithstanding his alienation, his feoffee may enter upon him. Bro. Droit 24. 26. 12 Ass. pl. 41. 50 Ass. pl. 3.

(*x*) Thel. Dig. L. 12. c. 30. § 12. Fitz. Briefs, 285.

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I proceed to give the form of a plea of entry by a stranger, by force of an older and better title.

65. Plea, entry by a stranger, pending the writ.

And now the said T. comes and defends his right when, &c. and says that before the day of the purchase of the original writ in this action, one S. was seised of the said demanded premises in his demesne as of fee, until he the said T., before the said day of the purchase of the said original writ unjustly and without judgment disseised the said S. thereof; and afterwards, and after the said day of the purchase of the said original writ, to wit, on the — day of — now last past, the said S. entered into the said demanded premises, and expelled and amoved him the said T. therefrom; and this he is ready to verify: wherefore he prays judgment of the said writ, &c. (y).

If the tenant had previously made any plea, this entry must be alleged to have been made *after the last continuance*; and the plea must be altered accordingly.

By this plea the tenant takes upon himself the burthen of proving that the stranger had a better title than his. If he yielded the possession to one who had no right to take it from him, it would be no more than a voluntary alienation of the land, which, as mentioned above, would not abate the writ. The demandant may therefore reply, that the tenant did not disseise the said S., and tender an issue (z); upon which the title of S. may be tried, in like manner as it would have been, if T. had resisted his entry, and he had thereupon brought an action for the land against T. It seems also, that although S. had the better title, yet if by covin between him and T., the latter had entered upon him, with the intent that if any action should be brought against T. for the land, S. should re-enter upon him for the purpose of abating the writ; upon proof of these facts, the demandant would prevail upon the above issue. The demandant ought not in that case to state the covin specially in his replication; because if T. entered by the consent and agreement of S. he did not disseise S., as he has alleged in his

(y) Rast. Ent. 232, and see Co. Lit. 287. a.

(z) Rast. Ent. 232.

plea (a); and therefore such a special replication would be merely argumentative.

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It would also probably be a good replication to the above plea, as it is to a plea of recovery by a stranger, to say that the tenant was seised of the premises at the commencement of the action and now is seised; as follows:

And the said D. says that his said writ ought not to be quashed, &c. because he says that he the said T., on the day of the purchase of the said writ was tenant as of freehold of the said demanded premises as above in the writ aforesaid is supposed, and now is tenant thereof as of freehold; and this he is ready to verify: wherefore he prays judgment if his writ aforesaid ought to be quashed, and that the said T. may answer over thereto.

66. Replication, that tenant was seised at the commencement of the action, and now is seised.

The averment in this replication, that T. was tenant at the commencement of the action, seems to be unnecessary, as the fact is already virtually confessed by the plea; but as it is inserted in the only two cases of this description that I have found (b), I have not thought myself warranted to reject it. That averment is not traversable; and the only rejoinder that the tenant can make is, that he is not now tenant of the freehold; as follows:

And the said T. says that he is not tenant of the said demanded premises as of freehold, as the said D. has above in his said replication alleged; and of this he puts himself on the country.

67. Rejoinder, traversing his seisin.

If the facts stated in the above replication are true, it must follow, either that there was some secret covin between S. and T., and that the latter is still in, under his former title; or that he has, since he was expelled, taken a conveyance from S., and so by his own act has made himself a good tenant to the writ (c). In either case the writ would be maintained; as there is no other person against whom the action could be brought, if this writ should be abated.

If the stranger entered as reversioner upon the deter-

(a) See 15 Ed. 4. 5.

(b) 7 Ed. 3. 368. 43 Ed. 3. 21.

(c) See *supra*, sect. 9.

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mination of a particular estate in the tenant, or for breach of any condition, or in any other manner upon a lawful title, his title or right of entry ought to be specifically stated in the plea, so that the demandant may traverse it, as in the above example.

I have not found in the books of entries any precedent of a plea of recovery by a stranger; although there are many such cases in the Year Books. The recovery, to have this effect, must be had upon a verdict, or at least after some defence made by the tenant; for if it is upon his confession, or default, or upon *nil dicit*, it would have no tendency to prove that the recoveror had the better title to the land; and would in effect amount to no more than a render *in pais*, or an entry by the stranger without a judgment. The tenant need not aver in this plea that the stranger had a title older or better than his; as this is supposed to be proved by the judgment.

The form of this plea may be as follows :

68. Plea, recovery by a stranger against the tenant pending the writ.

And now the said T. comes and defends his right when, &c. and says that heretofore, to wit, on the — day of — one S. sued out of the office of the Clerk of the Circuit Court of Common Pleas for the county of Middlesex a certain writ of entry upon disseisin (or, upon abatement, &c.) against him the said T. for the same tenements with the appurtenances which are now demanded by the said D. in this action (or, for certain tenements with the appurtenances whereof the said premises now demanded by the said D. in this action are parcel,) which same writ was directed to the then Sheriff of the said county of M. or his deputy, and returnable before the Justices of the same court then next to be held at C. within and for the said county of M. on the — Tuesday of — then next; the said S. alleging in the same writ and in the declaration therein contained that the said tenements with the appurtenances then demanded by him were his right and inheritance, into which the said T. had no entry but by one F. who had thereof unjustly and without judgment disseised him the said S. within thirty years then last past; and whereupon the said S. then said that within thirty years then last past, he himself was seised of the same tenements with the appurtenances in his demesne as of fee, taking the profits, &c. and into which, &c. On which said — Tuesday of — before the said last mentioned court came as well the said S. as the said T. by their respective attorneys, and the said then Sher-

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iff of the said county of M. (or, A. B. one of the deputies of the said then Sheriff of the said county of M.) then returned the same writ in all things duly served and executed; and he the said T. then defended his right when, &c. and said that the said F. did not disseise the said S. of the said tenements with the appurtenances in the same writ specified, in manner and form as the said S. had in that same writ and declaration complained against him the said T. and thereof he put himself on the country; and the said S. then did the like: whereupon the same cause after a full hearing of the said parties was committed to a jury duly sworn to try the same, who returned their verdict therein, and said upon their oaths that the said F. did disseise the said S. in manner and form as the said S. had in his said writ and declaration alleged: and thereupon it was then considered by the Justices of the same court that the said S. should recover his seisin against him the said T. of the said tenements with the appurtenances in the said last mentioned writ specified: and afterwards, to wit, on the — day of — the said S. sued out of the office of the same clerk for the said county of M. a writ of execution upon the judgment aforesaid, directed to the said then Sheriff of the said county, or his deputy, to cause him the said S. to have full seisin of the same tenements with the appurtenances; by force of which same writ the said then Sheriff afterwards, to wit, on the — day of — did cause the said S. to have full seisin of the same tenements with the appurtenances, and did expel and amove him the said T. therefrom: wherefore he the said T. prays judgment of the writ aforesaid of the said D., and that the same may be quashed, and for his costs.

In this plea I have endeavoured to follow the English precedents in analogous cases; varying from them only so far as was necessary, to comport with the forms of the records in our courts. The plea may be readily altered, and adapted to the form of the record and judgment which is the subject of the plea.

It is averred that execution was sued out on the judgment, in compliance with the rule laid down in Com. Dig. tit. Abatement (H. 54.) But it may perhaps be doubted whether such an averment is necessary. The cases cited by Thelol in the place referred to by Comyns (L. 12. c. 30. § 22.) do not seem to support the position; and it is perhaps meant only that the judgment must be executed in fact, that is, that the recoveror must



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have entered in virtue of the judgment (*d*). Many of the pleas of a judgment recovered in other cases, even when the tenant claims under the judgment, omit this averment. If it is retained, still it seems unnecessary to set forth the sheriff's return of the execution; as the tenant is effectually dispossessed, whether the execution is duly returned or not.

If it should be thought sufficient to state that the recoveror entered in virtue of the judgment, the clause in the preceding plea which relates to the execution may be omitted; and the plea, after stating the judgment, will proceed as follows :

69. The like,  
omitting the  
averment of an  
execution.

—by force of which said recovery the said S. afterwards, to wit, on the — day of — entered into the same tenements with the appurtenances, and expelled and amoved him the said T. therefrom, and was thereupon seised thereof in his demesne as of fee: wherefore he the said T. prays judgment, &c.

If the tenant had previously made any plea, he will of course aver that the execution of the judgment, or the entry of the stranger under it, took place *after the last continuance*.

It is a good replication to this plea, to say that the tenant was seised at the commencement of the action, and now is seised; and the form will be the same as that of the like replication to a plea of entry by a stranger; *supra*, pl. 66.

The demandant may also avoid the effect of the recovery by showing that it was had by covin between the recoveror and the tenant; but in that case the particular facts which show that it was covinous must be set forth in the replication, and it is not sufficient to aver merely that it was by covin. For this purpose the demandant may state in his replication some other plea or defence which the tenant might have made in the former action, and upon which he would have prevailed in that suit (*e*); as, for example, a release of all actions made by the demand-

(*d*) The cases cited by Thelol are 40 Ed. 3. 7. 7 Hen. 4. 17, and 7 Hen. 4. 3, which is misprinted 30. (*e*) 9 Hen. 6. 41.

ant in the former action to the tenant. So he may reply that since the commencement of this action the tenant had enfeoffed the stranger, and then disseised him, and that the recovery was had upon that disseisin (*f*). And if the feoffee in such case had entered upon the tenant, without a judgment, and this entry is pleaded, the demandant may make the like replication.

It is said in 9 Hen. 6. 41, that the demandant cannot, in his replication to this plea, deny or put in issue the point which was determined by the former verdict; or, as it is expressed in the ancient books, he cannot falsify the recovery in the point which was tried. This rule applies only when a recovery by a stranger is pleaded in abatement. If it is pleaded in bar, or goes to conclude either party as to his title to the land in dispute, it is not conclusive. It is obvious however that the tenant may have made a plea, in the action brought by the stranger, which was sufficient in law, and true in fact; and on the trial of that action he may have withheld, or omitted to produce, the evidence proper to maintain the issue on his part, and so by collusion with the stranger have suffered the verdict to pass against him. In that case the covin on the part of the tenant, and its operation, if successful, against the present demandant, would be the same as if the tenant had purposely made a plea in the other action, which he knew to be false in fact. If therefore the demandant in such a case should be restrained from traversing directly the point determined by the former verdict, he would probably be permitted to avoid the effect of the recovery by stating specially in his replication the covinous manner in which it was obtained.

This plea also, like that of an entry by the demandant, amounts to a special non-tenure; and would probably be allowed to be pleaded in our courts in bar of the further maintenance of the action.

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(f) Thel. Dig. L. 12. c. 30. § 9.

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A Demurrer to any of the pleas in this chapter would be substantially the same as to the like pleadings in personal actions. The judgment also, when it awards a *respondeas ouster*, or an abatement of the writ, would resemble the like judgment in personal actions. When the judgment is for the demandant, to recover his seisin, it would resemble the judgment for the demandant on a plea in bar (g).

(g) See *infra*, Chap. IV. § 9.

## CHAPTER IV.

## SECTION I.

*Pleas in Bar, to writs of Entry on disseisin.*

THE writs of entry are extremely simple, presenting generally in each case but one single point, on which the title to the land depends. They frequently indeed include some collateral circumstances; such as the estate of the demandant, when he claims less than a fee-simple; or his title or right to bring the action, when he sues as heir, successor, or assignee; but these do not, strictly speaking, affect the merits or gist of the action, that is, the title to the land, or the seisin which is supposed to have been wrongfully acquired or withheld by the tenant. As far as it respects this latter point, the writ may be so varied as to be adapted to every particular case, excepting perhaps some instances of the writ of entry in the *post*. If the writ is not so adapted, the tenant may, by the appropriate plea, compel the demandant to amend his writ, or to sue out another, which shall present truly the question on which the title depends. When the writ is in proper form, the tenant can generally try the whole merits of the case by an issue tendered upon the most material fact or point of the writ. Hence it is that, whilst the pleas in abatement in real actions are so numerous in the ancient books of entries, we find very few special pleas in bar.

It may sometimes be expedient for the tenant to set forth specially his title, or right of entry, although it be such as he might have given in evidence under the general issue, in order to narrow or simplify the questions to be left to the jury, or to present his title as a question of

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law to the court. But such a plea hardly need be considered among the pleas in bar to the action ; because it amounts to the general issue, and would be adjudged bad on special demurrer, unless, to avoid that consequence, it *gives colour* to the demandant. It serves only to display on the record the facts which the tenant would otherwise undertake to prove under the general issue. Such a plea therefore will vary with all the variations of title by which a tenant may hold the land in dispute ; and for this reason, as also because the tenant can never *be required* to plead in this manner, I have considered it unnecessary to give any forms of such pleas.

When the writ is founded on the seisin of the demandant, and a disseisin by the tenant, the general issue seems adapted to open every ground of defence on the merits or gist of the action, that can possibly exist. On the trial of that issue the demandant must first prove his seisin ; and if he does so, the tenant may prove any facts that will show that he had a right of entry at the time of the supposed disseisin (a).

But if the demandant was seised and disseised, as alleged in the writ, and the tenant relies on any other matter in discharge of the action, he must plead such matter specially. Thus if the demandant, suing as the Minister of a Parish, or other sole corporation, should resign or be removed pending the writ, this would determine his estate, and destroy his right of action. The like effect would follow from his entry pending the writ ; as also from his release to the tenant, either of the action, or of his right to the land ; or from a release of the right to the land made to any other person whose estate has come to the tenant. So the estate of the demandant may be destroyed by other events, such as the death of *cestuy que vie*, when the demandant holds for the life of another.

When the demandant sues as heir or successor, the writ may be considered as containing a statement of two distinct titles : first, *the title to the land*, as alleged to have existed in the ancestor ; and secondly, *the title to the ac-*

(a) 5 Mass. R. 236. 352. 6 — 308. 418.

*tion*, existing in the demandant, as heir. As to the first, the general issue will commonly let in the tenant to every legal defence to the gist of the action. The demandant, on the trial of that issue, would first be required to prove the seisin of his ancestor or predecessor; and the tenant, if he could not disprove that fact, would be allowed to prove by any legal evidence that the supposed disseisor had a right of entry. As to the second title, or the right of the demandant to bring the action as heir, or successor, though it may have no connexion with the title to the land, and therefore is not brought in question under the general issue, yet it is obviously essential to the maintenance of the action, and may always be traversed by an appropriate special plea. So, although the demandant is the heir of the person last seised, yet if that ancestor had only an estate tail, or for his own life, this fact may be pleaded in bar.

If the right of action once existed as alleged in the writ, it may have been afterwards barred and determined by different events, occurring either before, or after, the commencement of the action, each of which is the subject of a special plea. Such are a release by an ancestor of the demandant, or by a stranger who had a better title; or the birth of a nearer heir, between the present demandant and his ancestor. Of the like nature are a recovery, or a bar, in a former action of the same, or of a higher nature, between the same parties; or any matter of estoppel (*b*). The Year Books make mention occasionally of other pleas in bar, some of which seem to amount to the general issue, and of which others will seldom, if ever, occur in our practice (*c*). The examples which I have undertaken to give in this chapter will, it is hoped, sufficiently show the *forms* which are necessary to be regarded in framing pleas in bar; and when the *matter* of them is in any measure new or peculiar, it must be left to the pleader to state it truly and correctly according to the general principles and rules of pleading.

(*b*) 6 Co. 7. Ferrer's case. 10 Co. 90. Leyfield's case.

(*c*) As the plea of *hors de son fée*, of a Fine, and a collateral warranty.

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When the writ is in the *post*, the tenant will sometimes find it necessary to make a special plea, which will vary according to the title on which he relies in his defence. If he in fact holds under the first supposed disseisor, the pleadings will be substantially the same as when the writ is within the degrees; but whenever he relies on any other title than that of the supposed disseisor, he must set forth his title specially in a plea in bar.

To these ancient pleas in bar we may now add many of those mentioned in the preceding chapter, which were formerly pleaded to the writ, or to the action of the writ, and which have been, or probably may be, allowed in modern practice to be good pleas to the action.

## SECTION II.

*The General Issue.*

The *general issue*, is a direct denial of the disseisin alleged in the writ and count. When the writ is in the *quibus*, upon the demandant's own seisin, this plea is as follows:

## 1. General issue.

And now the said T. comes and defends his right when, &c. and says that he did not disseise the said D. of the tenements aforesaid with the appurtenances, as the said D. has above in his writ and declaration aforesaid complained against him; and of this he puts himself on the country.

Or, that he did not disseise the said D. as he has above in his writ and declaration aforesaid supposed; (or, alleged; or, complained against him;) and of this, &c.

If the demandant has declared on the seisin of any ancestor, or predecessor, as of F. his father, the plea is,

## 2. The like, on disseisin of an ancestor.

—that he did not disseise the said F. as the said D. has above in his writ and declaration aforesaid complained against him; and of this, &c.

If the writ is in the degrees, or in the *post*, as upon a disseisin committed by one A. the plea is,

—that the said A. did not disseise the demandant (or, the said F.) as the said D. has above in his writ and declaration aforesaid complained against him the said T. and of this he the said T. puts, &c.

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3. The like, in  
the degrees or  
the *post.*

On the trial of this issue, it is first necessary for the demandant to prove the seisin on which his action is founded; whether it be of himself, or of his ancestor or predecessor; and if that fact is proved, the only defence that the tenant can make is to prove a right of entry in himself, if the writ is in the *quibus*, and otherwise, in whoever is named in the writ as the disseisor (*d*). This seisin on the part of the demandant must be proved to have been within the time prescribed by the statutes of limitations (*e*); as the tenant is not required to plead the statutes specially.

The evidence of seisin on the part of the demandant may be rebutted by the tenant, without his undertaking to show any title, or right of entry, on his own part (*f*). He may disprove the facts which the demandant has attempted to prove; or if they are of an equivocal nature, he may explain them by evidence on his part; so as to show that the demandant, or his ancestor, were not seised as alleged in the writ. Such evidence not only tends to show that the demandant has no cause of action; but it comes literally within the terms of the issue; for if the demandant, or his ancestor, or predecessor, was not seised of the premises, he could not have been disseised as alleged in the writ.

It is considered as a settled principle that the tenant cannot avail himself of the title of a stranger, unless he holds under it; that is, he cannot defend himself by proving that a third person has more right to the land than either himself or the demandant. If I have disseised A. and then B. disseises me, and I bring an action against B. he will not be permitted to show this better title in A.; because it has no tendency to prove that he, B. had a

(*d*) 6 Mass. R. 418.

(*e*) Stat. 1786. c. 13. and Stat. 1807. c. 75.

(*f*) See Bro. Que estate 34. 7 Ed. 4. 26. 6 Mass. R. 241. 418.



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right of entry upon me. As a stranger, who has no title, cannot recover the land against me by action; so neither shall he take it from me by a mere entry *in pais*; nor in any manner put me to prove my title to the land. (g)

But this rule does not prevent the tenant from proving a title and possession in a stranger, when the effect of it is to disprove or destroy the title of the demandant, on which the action is founded. In every writ of entry on disseisin, the demandant's title to recover is the seisin of himself, or of his ancestor or predecessor, which is set forth in his writ and declaration. If the general issue is pleaded, and the demandant proves that seisin, this is sufficient, *prima facie*, to maintain his action. Any evidence therefore on the part of the tenant which is sufficient to disprove the seisin on which the demandant relies, will destroy and take away the whole cause of action, whatever may be the title of the tenant. Thus if the tenant can prove that, during the whole time to which the demandant's evidence relates, one A. a stranger, was seised of the premises, and that the possession of the demandant or his ancestor was as tenant for years of A. or as his servant or bailiff; this will in effect directly disprove the demandant's title or cause of action.

The principles relating to this subject are the same which apply to pleading by a *que estate*. The party who pleads in that manner sets forth a title in a stranger, and then alleges that he has all the estate which that stranger had, but does not show how he acquired the estate. He who *makes title*, or sets up a title in himself, must always show with certainty how he acquired it, and cannot allege it by a *que estate* (h). As this is the case with the demandant, or plaintiff, in every action, and as the tenant or defendant usually denies that title, it is stated as a general rule that the latter may plead by a *que estate*, and that the demandant or plaintiff cannot (i). But if the defendant admits the plaintiff's title as set forth by him, and undertakes to show a better title in himself, he then becomes *actor*, and must show his title with the same certainty that

(g) 7 Ed. 4. 26.

(h) Plowd. 56, 57.

(i) Co. Lit. 121.

was before required of the plaintiff; and he cannot therefore plead by a *que estate*. Thus in an action of Replevin, the defendant, if he avows, becomes *actor*, and must set forth his title with the same certainty that is required in a declaration; but the plaintiff in his replication, or bar to the avowry, may plead by a *que estate*. So in trespass, if the defendant pleads that he was seised, until disseised by the plaintiff, upon whom he re-entered; this admits the plaintiff's title, that is, his possession at the time of the supposed trespass, and sets up a better title in the defendant. The latter has therefore become *actor*; and the plaintiff may reply that the defendant enfeoffed a stranger, whose estate he, the plaintiff, has, without this that he disseised the defendant (*k*). It is said indeed in the case last cited that such a replication would not be good in an Assise; and that the plaintiff, even though he traverses the bar, ought to trace his own title with certainty, and show how he has the estate of the stranger. This opinion, if correct, would apply only to the form of pleading, and would not affect the question which we are now considering; because it is admitted in the same case that the title thus set up by the plaintiff, is not traversable. The plaintiff therefore in such a case would not be required to prove how he acquired the estate of the stranger, even if he had stated it in his replication; and *a fortiori* he need not prove it, when the point arises on general pleading, without any such averment on his part (*l*).

The principle to be deduced from the numerous cases on this subject is, that neither party can set up a title in himself by a *que estate*; but either of them may adopt that course when undertaking to disprove the title of the other. Thus, it would be absurd for the demandant in a writ of entry to set forth a title or cause of action in A. unless he shows that this title is now, by descent or otherwise, vested in himself. He cannot therefore make title to himself in the declaration by a *que estate*; but

(*k*) Fitz. Ab. Que estate. 16. 6.

(*l*) See on this subject, Com. Dig. Pleader, E. 23. 24. Vin. Ab. tit. *Que estate*, C. D. E. and the Abridgments of Fitzherbert, and Brooke, under the same title.

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must state distinctly and precisely how the estate or title came to him. The tenant on the other hand, may plead that the estate came from A. to another person, and not to the demandant, without showing that he, the tenant, has the estate of that other person (*m*). So if the tenant admits that the demandant is the heir of A. he may disprove the other part of the title set forth in the writ and declaration, to wit, the seisin of A., by showing that a stranger was seised, so that A. could not be seised; without showing that he has the estate of that stranger. In this latter case he is not required to plead the matter specially, because such a plea would be argumentative; for if A. was never seised, he could not be disseised; and therefore this matter may be given in evidence under the general issue; but the principle is the same, whether applied to the pleadings, or to the evidence.

But when the tenant, instead of denying the title of his adversary in these respects, undertakes to prove a right of entry in himself, or in whoever else is named in the writ as the disseisor, he becomes *actor*, and sets up a title in himself; which, by the rule before mentioned, he cannot do by way of a *que estate*. Suppose for example that A., in the case last mentioned, had held the land upon a certain condition, and that T. had entered for the breach of that condition; for which entry this action is brought against him. Here it is manifest that T. is the real plaintiff, or *actor*. It is he who undertakes to disturb the existing state of things; he claims the land against the person in possession, and is pursuing his remedy in the mode which the law prescribes; and the burthen is therefore on him to show that he had the right which he has thus undertaken to enforce. Suppose in such a case that T. had died, without entering for breach of the condition, and that S., claiming as his heir, had made the entry on A. In an action brought against S. for this entry, it is clear that he must show, not only that T. had such right of entry, but that he is the heir of T. The tenant in the two cases last supposed must show his title with the same degree of certainty, as if the law had pre-

(*m*) Bro. Bar. 17. Fitz. Bar. 219. 2 Inst. 309, 400.

scribed an action, instead of an entry, for the breach of the condition ; and as if he was setting forth his title to the land in a declaration, instead of a plea ; or producing evidence to maintain an action, instead of defending an action brought against him. If after such an entry by S., as in the case last supposed, one R. had entered, (by, or after S.) and the action had been brought against R., the latter, if he pleads the general issue, must prove the right of entry in S., in the same manner as in the preceding case. The tenant, R., would not be required in this instance to prove that he has all the estate of S. ; because this is already admitted and stated in the declaration. And, in truth, if S. had such right of entry, and had accordingly entered, and destroyed the estate of the demandant, it would be wholly unimportant to the latter to inquire in what manner the premises afterwards came to the possession of the present tenant. In the case supposed, S. is the real *actor* ; it is he who claimed the land against the person in possession, and who entered to enforce that claim. If the tenant proves that this entry was lawful, he destroys the title on which the action is founded ; and this is a sufficient defence, whatever may be the title of the tenant. The same principle applies in every case, when the tenant undertakes to prove a right of entry in the person who is named as disseisor in the writ, of whatever nature that right of entry may be.

It appears therefore that the rule, which prevents the tenant from showing a title in a stranger, is confined to those cases in which the tenant is also setting up a title in himself. So long as he is merely repelling and disproving the claim of the demandant, he may for that purpose show an adverse title in a stranger.

When the trial is had upon the general issue, and the demandant has proved the seisin of himself, or of his ancestor, or predecessor, on which his writ is founded, the only defence for the tenant, as above stated, is to prove that the person who is named as disseisor in the writ had a right of entry upon the person who is said to have been disseised. It is strictly a *right of entry* that must be proved in this case by the tenant ; for although it should

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appear that the supposed disseisor had the right of property, and even the right of possession, yet if he had lost his right of entry at the time of the supposed disseisin, the tenant must fail in this defence.

There appears to have been more irregularity in the ancient practice in our courts on this point, than on any other connected with real actions. When the parties proceeded to trial on the general issue, the trial was too often considered to be a mere comparison of their respective titles, without regard to the nature of those titles. If the tenant could show that he, or the supposed disseisor, had *more mere right* than the demandant, he would sometimes prevail in the suit, although the right of entry had been barred for many years before the time of the disseisin complained of. This course of proceeding not only confounds the distinctions between the different actions, but is in direct violation of the rules of the common law, and the provisions of our statute of limitations (n). No lawyer, after the passing of that statute, would have advised a party to enter upon lands, whatever might be his title to them, if that title had accrued more than twenty years before; unless the case came within some of the exceptions in the statute. Yet if the party had made such an entry, and if in twenty or thirty years afterwards an action had been brought against him upon that disseisin, it was generally supposed that he might defend himself by showing merely that he had the right of possession, or of property. This is one example, out of the many which must frequently occur to every member of the profession, of the inconvenience arising from the neglect of the established forms of pleading. At the time referred to, little or no distinction was made, either in the declaration or the pleadings, between the different writs of entry, or between them and the writ of right. If they had pursued the *forms* which are prescribed by the common law for these actions, they could not have fallen into such mistakes in the manner of trying and determining the *rights* of the parties.

(n) Stat. 1786, c. 13.

By the act for regulating the jurisdiction and proceedings of the Courts of Probate (*o*), it is enacted that when the real estate of a person deceased is sold by his executors or administrators for the payment of his debts, under a license from any of the courts that are authorized to grant such license, or when the real estate of minors or other wards is sold under such a license by their guardians or others, no heir or other person interested shall maintain an action for the recovery of such real estate, unless the action be commenced within five years next after the execution and delivery of the deed. This clause contains a proviso in favor of minors, and persons under other legal disabilities, or out of the Commonwealth, at the time of the sale; who are allowed respectively to bring such actions within five years after the removal of the disability, or return to the Commonwealth.

The provisions of this section were apparently intended for the heirs of the testator or intestate, or for the ward, or his heirs; and not for strangers, claiming under a title adverse to, or unconnected with, theirs. The executor, administrator, or guardian, who makes the sale, acts as the agent or trustee of the ward, or of the heirs of the person deceased; and it was thought that five years was a sufficient time to enable them to look into the transactions of their agent, and to ascertain whether he had faithfully and properly conducted their affairs. As to the purchaser also, it was probably thought unjust that he or his assigns should be exposed to an action on the part of those whose estate he had purchased, at the distance of thirty or forty years after the sale; and that his title should depend on the evidence that could be then produced as to the proceedings of the vendor, who acted as the agent of his adversary in the suit. After such a lapse of time his remedy on the covenants in the deed of conveyance might frequently become fruitless, by the death of the vendor, or a change in his circumstances.

But with regard to a stranger, claiming under a title older and better than that of the testator or intestate, or

(*o*) Stat. 1817, c. 190. § 12.

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of the ward, there appears to be no reason why he should be affected by such a sale by an agent, any more than he would have been by a sale by the principal. To give such an effect to the conveyance of the administrator, would make it equivalent to a fine with proclamations in the English law. This would be to introduce a principle hitherto unknown in our jurisprudence, and one which would have a most important and extensive influence upon titles to real estate. If the Legislature had thought proper to adopt such a principle, they would not probably have introduced it, in this indirect manner, in an Act for regulating the Courts of Probate. The words of the statute may indeed appear broad enough to include all who claim any title whatever to the land; but the expression there used, of *other persons interested*, may well be confined to those interested in the *estate* that is sold, and not be extended to those who are otherwise interested in the *land*. The license or authority to the executor, administrator, or guardian, is to sell *all the estate*, right, or interest, of the person deceased, or of the ward; and all who claim *that same estate*, by, through, or under, the person deceased, or the ward, and no others as I apprehend, are within the provisions of this clause of the statute. The effect of the statute upon the construction which I have suggested would be, that the validity of such a sale could not be questioned in any action brought after the period limited; so that a demandant, who cannot make out a good title without impeaching that sale, would be barred.

## SECTION III.

*Act of the Demandant, which determines his estate, or destroys his right of action.*

Although the demandant had a good cause of action at the time of commencing his suit, yet his estate may be afterwards determined, or his right of action otherwise destroyed, by his own act. In such a case the fact should be pleaded in bar of the further maintenance of the action.

If a minister, claiming in right of his parish, should be dismissed after the commencement of the suit, the plea might be as follows:

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And the said T. comes and defends his right when, &c. and says that the said D. ought not further to have or maintain his action aforesaid thereof against him, because he says that after the commencement of this action, to wit, on the — day of — the said D. was duly and legally dismissed from his said office of minister of the said first parish in B. aforesaid; and this he is ready to verify; wherefore he prays judgment if the said D. his action aforesaid thereof against him the said T. ought further to have or maintain, and for his costs.

4. Plea, that demandant suing as Minister, was dismissed pending the writ.

If this matter should be pleaded as after the last continuance, the form would be varied as usual.

I have used the word *dismissed*, supposing it to be applicable, according to our ecclesiastical usages, to every case in which a minister of a Congregational society is removed from his office. Whatever may be the cause of the removal, it is usually effected through the agency of an Ecclesiastical Council, who recommend that the party should be dismissed, or have a dismission, from the church and society. If it should be thought necessary to state the facts more particularly, the plea may be readily framed according to the circumstances of each case, and by reference to the precedents in Rastel's Entries, under the titles, *Depose*, *Deprivation*, and *Resignation*.

Replication.

And the said D. says that he was not dismissed from his said office of minister of the first parish aforesaid, in manner and form as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

5. Replication, that he was not dismissed.

If an entry by the demandant after the commencement of the suit should be considered a good bar to the further maintenance of the action, a plea to that effect might be in the following form:

— and says that the said D. ought not further to have or maintain, &c. because he says that after the last continuance, &c. (or, after the commencement of this action) to wit, on — he the said D. entered into the tenements aforesaid with the appurtenances,

6. Plea, entry of demandant after the last continuance, or pending the writ.



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and expelled and amoved him the said T. therefrom; and this he is ready to verify; wherefore he prays judgment if the said D. ought further to have or maintain his action aforesaid, &c.

In the precedent in Rast. Ent. 107, it is averred that the demandant is now seised of the premises (*p*); but this averment is omitted in the two other precedents in Rastel (30. and 365.) In 4 Ed. 3. 148. (Trin. pl. 19.) an objection was taken to a plea of this kind for the want of that averment; but the objection was overruled; and it was said that the writ was abated by the demandant's entry, although he might have afterwards aliened the premises. So if he had been disseised by a stranger after such an entry, the plea would still be good.

If the tenant himself has re-entered on the demandant this will be a good answer to the plea; and the demandant may reply as follows:

7. Replication,  
re-entry by  
tenant.

And the said D. says that he ought not to be barred from further having and maintaining, &c. because he says after the said supposed entry into the said demanded premises by him the said D., to wit, on the — day of — he the said T. re-entered into the same premises, and expelled and amoved him the said D. therefrom; and this, &c. wherefore he prays judgment, and that seisin of the said demanded premises, together with his costs, may be adjudged to him.

In Com. Dig. tit. Abatement (H. 48,) it seems to be considered necessary in this replication to aver that the tenant is now seised of the premises; and he cites Thel. Dig. Lib. 12. c. 21. § 22. Theloal, in the place cited, quotes an opinion of Herle, in 8 Ed. 3. 388, (P. pl. 7,) that it is a good answer to such a plea, to say that the tenant is now tenant of the land, as in the writ is supposed; and it appears in the Year Book that Herle refused to admit a replication, that the demandant had not entered on the tenant. If this opinion were correct, it would not show that the averment in question ought to be added to the replication of a re-entry by the tenant; but rather, that this averment alone would make a good

(p) See Dyer 227. pl. 42. in *Sci. facias*.

replication, without alleging a re-entry by the tenant. But Theloal, in the same place, cites 26 Hen. 8. 1. where Fitzherbert held, that a replication like that mentioned by Herle was bad ; and that the demandant might reply, that after his supposed entry, the tenant had re-entered on him. The demandant would of course have been allowed to traverse the supposed entry by himself ; and he seems accordingly to have made such a replication, afterwards in Trin. Term, 26 Hen. 8. 7. pl. 33. This latter opinion is manifestly the most correct, as the demandant would by one of these replications confess and avoid the plea, and by the other he would traverse it ; whereas by the replication proposed by Herle, it would be left uncertain whether the demandant intended to deny his own entry, or to prove a re-entry by the tenant. It is equally clear that it is not necessary, in the replication of a re-entry by the tenant, to aver that he is now seised of the land ; because he may have aliened it after his re-entry ; and there is no reason why this alienation should abate the writ, or bar the action, any more than a like alienation when there had been no such entry and re-entry pending the writ (*q*).

The only rejoinder to this replication would be, to deny the re-entry by the tenant, as follows :

And the said T. says that he did not re-enter into the said demanded premises after the said entry of the said D. thereinto, as the said D. has above in his said replication alleged ; and of this he puts himself on the country.

8. Rejoinder, that he did not re-enter.

If the demandant would deny the entry alleged in the plea, his replication would be as follows :

And the said D. says that he did not enter into the tenements aforesaid with the appurtenances, as the said T. has above in his plea aforesaid alleged ; and this he prays may be inquired of by the country.

9. Replication, that demandant did not enter.

(*q*) See *supra*, Ch. III. § 9. pa. 93.

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## SECTION IV.

*Death of a stranger, or other event which determines the estate of the demandant.*

The estate of the demandant may also be determined after the commencement of the action, by events in which he has no agency. Thus if the demandant claims to hold for the life of another, and *cestuy que vie* dies whilst the action is pending, this would determine the estate of the demandant, and destroy his right of action. So if he sues as the brother and heir of A. and pending the writ, a posthumous child of A. is born.

The plea in the first case might be as follows:

10. Plea,  
death of *ces-  
tuy que vie*.

— and says that the said D. ought not further, &c. because he says that after the commencement of this action (*or*, after the last continuance, &c.) to wit, on — the said A. B. mentioned in the writ and declaration aforesaid died; and this he is ready to verify; wherefore he prays judgment if the said D. ought further to have or maintain his action aforesaid thereof against him the said T., &c.

## Replication.

11. Replica-  
tion, that he is  
alive.

And the said D. says that he ought not to be barred from further, &c. because he says that the said A. B. is in full life, and not dead, as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

The plea of the birth of a nearer heir would be analogous to those in sect. 6. of this Chapter, showing that the demandant is not heir.

## SECTION V.

*Release or conveyance, after the disseisin, to the tenant, or to one whose estate he has.*

If the demandant is entitled to bring and maintain the action, and if the tenant cannot deny the disseisin alleged

in the writ, he may avoid its effect and defend himself, by showing that he has subsequently acquired a better title, or a confirmation of his estate. Thus, according to the case put by Littleton, sect. 473, if I am disseised by D. and then D. is disseised by T. and whilst my right of entry remains, I release to T., this passes all my right to T. and will enable him to hold out the party whom he had disseised. So if my right of entry had been tolled, and I had recovered the land in an action against T. and had afterwards conveyed it to him, this would have the like effect. In these cases, if D. should bring his action against T. the latter could not justify his entry; and if the parties should proceed to trial upon their original rights, the demandant would prevail. The tenant therefore, instead of relying on the general issue, should set forth in a special plea the new title which he has thus acquired.

When the release or conveyance is made by the demandant himself, or by one of his ancestors, it may be more questionable whether it is always necessary to plead it specially. If made by the same person who was disseised, it may be considered as purging the disseisin, and making the estate of the disseisor lawful (*r*), in like manner as if he had originally had a right of entry. If so, it would furnish a good defence under the general issue. Yet there is in Fitz. tit. Barre, 3, a case of entry on disseisin to the demandant's father, where the tenant pleaded a release made to him by the father; and the plea was held good. This case is not reported in the Year Book; and we therefore know nothing of the facts; but from this short note in Fitzherbert's Abridgment. There is also another case, in Fitz. tit. Feoffments and Faits, 112, which was in the time of Edward 1, where in a writ of entry (which seems to have been on the seisin of the demandant) the tenant pleaded a release and quit-claim of the demandant, and issue was joined on the replication of *non est factum*. Such a plea, in bar of an assise of novel disseisin, or of mortdancestor, (Fitz.

(*r*) Co. Lit. 274. 278. b. Keilwey, 136, pl. 123. Bro. Releases, 22.

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same title, 83 and 112,) stands upon a different ground; because the mode of trial, as well as the points to be inquired of, are different on a plea in bar, from what they are when the assise is taken without such a plea. A like observation may be made as to the same plea in the writs of *Ad terminum qui præterit*, and *Cui in vita*; (Fitz. same title, 72 and 95,) because in those, the original entry on the part of the tenant is not unlawful, and the release cannot operate as it does in case of a disseisin. But though it may not be necessary to plead such a release by the demandant himself, or by the ancestor who was disseised, it would probably be necessary to plead it when made by any intermediate ancestor, through whom the right is alleged to have descended to the demandant (s); as in the analogous case of *darrein seisin* with title.

When the release is by a stranger, the plea may be as follows:

12. Plea, release by a stranger to the tenant.

*Actionem non*, because he says that before the said D. had any thing in the said demanded premises, one A. B. was seised thereof in his demesne as of fee, and continued so seised thereof until he the said D. unjustly and without judgment disseised him the said A. B. of the same premises; and afterwards, and whilst he the said T. was seised of the said demanded premises, to wit, on the — day of — the said A. B. then having a lawful right of entry therein to (t), did by his deed of that date, duly executed, acknowledged and registered, and here in court produced, remise, release and for ever quit-claim unto him the said T. and his heirs and assigns forever all his the said A. B.'s right, title and interest in and to the tenements aforesaid with the appurtenances; and this, &c. wherefore, &c.

Not having met with any precedent of this kind, I have been governed by the principles of law relating to such releases; and have endeavoured to introduce into the above plea all the facts necessary to make the release effectual. First, it is necessary that the estate of the demandant should have commenced by wrong, and that

(s) See Keilwey, 136, pl. 123.

(t) Co. Lit. 266. 278, 279.

the title of the relessor should be older and better than that of the demandant. This is shown by stating that the demandant's title commenced by his disseising A. B. In the plea of entry by a stranger on the tenant, pending the writ, it must appear that the stranger entered by force of a title older and better than that of the tenant; and in the precedent in Rast. 232, this fact is considered as sufficiently stated by the averment, that the tenant had disseised that stranger. Secondly, it is necessary that the release in this case should be made to one who had at the time a freehold in the premises (*u*). But as it is admitted by the demandant in his writ and declaration that the tenant is now seised of the premises, it seems sufficient to aver that the release was made whilst he was so seised; without distinctly averring his entry and seisin. Thirdly, it is necessary that the disseisee should have a right of entry at the time of making the release; otherwise it would not avail the tenant in this possessory action. It is accordingly averred in the plea that the relessor had a right of entry. There seems to be no other mode of stating this point, unless it be, to set forth in the plea the time of the disseisin by the demandant, and the time when the release was made; and also all the intermediate demises and estates between the first disseisor and the present tenant; so as to show that the disseisee's right of entry had not been barred by the statute of limitations, nor by a descent cast. But the tenant may be a stranger to all these intermediate demises and estates; and it may be impossible for him to state them all in such a manner, that he can safely rest his defence on either one which the demandant may choose to traverse. The averment that the relessor had a right of entry contains one single point; and if it should be traversed, there would be no more difficulty in trying it, than in trying the like question upon the general issue in a writ of entry upon disseisin. When the tenant is alleged to have no entry but by, from, or after one A. if the general issue is pleaded, A.'s right of entry must be tried; al-

(*u*) Co. Lit. 265, 266.

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though he may be a stranger, and although his right of entry may depend on as great a variety of facts, as would be involved in an issue on this averment in the above plea.

The release in this plea is supposed to have been made to the tenant himself. If it is made to any other person under whom the tenant holds, and if the writ is within the degrees, the releesee will of course be named in the writ. In that case the only change in the plea will be, to substitute the name of this releesee for that of the tenant, in stating the release ; because the demandant admits that all those who are named in the writ, and through whom the tenant is supposed to have acquired his estate, were successively seised in fee.

If the writ is in the *post*, the names of those by, or through, whom the tenant may have received the estate, will not appear in the writ. In this case, if the release was made to the person named as disseisor, or to the tenant, the plea will still be in the same form. But if it was made to any intermediate holder of the estate, it will be necessary to show that he was seised at the time when the release was made to him.

The plea in that case, after stating the former seisin of A. B. and the disseisin by the demandant, would proceed as follows :

13. The like,  
to one, *que*  
estate the ten-  
ant has.

— and afterwards, and after the entry of the said G. (*the disseisor named in the writ*) in the declaration aforesaid mentioned, one E. F. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and had therein all the estate which the said G. then before had in the same ; and afterwards, and whilst the said E. F. was so seised of the tenements aforesaid with the appurtenances, to wit, on the — day of — he the said A. B. then having a lawful right of entry thereinto, did by his deed of that date, duly executed, acknowledged and registered, and here in court produced, remise, release and for ever quit-claim unto him the said E. F. and his heirs and assigns for ever all his the said A. B.'s right, title and interest, in and to the tenements aforesaid with the appurtenances : all the estate of which said E. F. in the same tenements with the appurtenances he the said T. now has therein ; and this, &c. wherefore, &c.

It is not necessary to state how the relesee acquired his estate in the premises; because whether it was by lawful conveyance from G. or by disseisin, the release would be equally effectual to bar the demandant (x). So it seems unnecessary to state that the tenant holds by a lawful conveyance from or under the relesee; because the plea directly answers and avoids the title of the demandant. The demandant's action is founded on his seisin, and the disseisin alleged in the writ. The plea shows that this seisin of the demandant was upon a defective title, and that it has been lawfully defeated. After E. F. has thus acquired a perfect title to the land, if he should be disseised by the tenant, this would not revive the title of the demandant. The title of the tenant, though defective as against E. F. would be good against every other person. It seems therefore sufficient to allege in the plea, that the tenant has all the estate of the relesee, without showing how he acquired it (y).

It may perhaps be doubted whether it is necessary in our practice to make *profert* of the deed of release in this latter plea. It is not customary with us for the vendor or grantor, to deliver his title deeds to the purchaser, nor to covenant that he will produce them, when required by the purchaser or his assigns. This has probably arisen from the establishment of the offices for the registry of deeds, where all such conveyances of real estate are registered at length. Copies, certified by the register of deeds, are in many cases used, by those who are not parties to the deed, in like manner as the originals would be used. But when the point of an action, or of a defence, depends on a particular deed, the party would probably be required to produce it in our courts, in like manner as he is at the common law (z). It will at least be the safest course to produce it when practicable in this case; be-

(x) Co. Lit. 276, 277, 278.

(y) See supra, this Chap. § 2. pa. 161, as to pleading with a *que estate*. The above plea however would undoubtedly be good, if it stated the conveyance or descent from the relesee to the tenant; although such statement should not be necessary.

(z) See 10 Co. 88. Leyfield's case.



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cause the *profert*, even if it is not necessary, will not vitiate the plea.

The above forms are adapted to a writ which is founded on the seisin of the demandant. If it is founded on the seisin of an ancestor, the plea will be the same, only substituting the name of the ancestor for that of the demandant. If the demandant, or the ancestor on whose seisin he declares, was in by descent, there would seldom be occasion for this plea at the common law; because such a descent would generally take away the disseisee's right of entry. But as there are some exceptions to this rule, it may happen that a stranger has a right of entry, even when the ancestor of the demandant has died seised, and when the demandant, or an intermediate ancestor, was in by descent at the time of the disseisin complained of in the writ. In this, and in all other cases of a release by a stranger, it will be necessary to state or to aver in the plea, that the releasor had a right of entry upon a title older and better than that of the demandant.

The demandant, in his replication to this plea may traverse either of the three points on which it is founded. It may also happen, when the writ is in the *post*, and the tenant pleads by a *que estate*, that the demandant himself may have all the estate of the releassee; in which case he ought to state that fact specially in his replication (a).

If the demandant would traverse the first of the three points in the plea, it is sufficient to deny the disseisin alleged to have been committed by him, or by his ancestor. The point to be tried would then be the same as if a writ of entry had been brought by the releasor, or his heir, against the now demandant upon that supposed disseisin, and the demandant had pleaded the general issue. Such a replication would be as follows:

14. Replication, *non disseisin*.

And the said D. says that he (*or*, that the said F.) did not disseise the said A. B. as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country (b).

(a) Fitz. *Que estate* 11. Bro. *Traverse* 226. 7 Ed. 4. 26. But see 19 H. 6. 56. Bro. *Que estate* 11. *Traverse* 78.

(b) See *Rast.* 232.

The second point involves the fact of making the release, and also its effect and operation. Both of these are embraced in the replication, that the said A. B. did not release, &c. This seems to be sufficient in all cases when the person pleading is not a party or privy to the deed in question. If the release is alleged to have been made by the demandant, or by his ancestor, the replication should be, *non est factum*, or that nothing passed by the deed (c). The latter seems to be the proper course, when the demandant does not deny the execution of the deed, but contends that it is ineffectual, for want of a sufficient title or estate on the part of the relessor, or of the relessee; as, if the relessor at the time of the release were only heir apparent; or, if the relessee then had no estate in the land.

When the relessor is a stranger to the demandant, as in the case supposed in the above two pleas, the replication, traversing the making and the efficacy of the release, may be as follows:

And the said D. says that the said A. B. did not remise, release and quit-claim unto the said T. (or, to the said E. F.) and his heirs and assigns forever all his the said A. B.'s right, title and interest, in and to the tenements aforesaid with the appurtenances, as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

15. Replication, that A. B. did not release.

As to the third point, there seems to be no other mode of replying, but to traverse the fact in the terms in which it is alleged in the plea. The issue thus formed has not, it must be confessed, much resemblance to the technical nicety of the ancient pleadings in real actions; and this may lead to some doubt whether the plea in bar is correct in that particular. But if it is sufficient in the plea, to aver in general terms that the relessor had this right of entry, I apprehend that the demandant must be allowed to traverse it in the like manner. The replication would then be as follows:

(c) See Vin. Ab. tit. Faits (N. a.) Fitz. tit. Feoffments et Faits, 14, &c. Bro. tit. Estranger al Fait, 2. 4. 7., &c. 2 Taunt. R. 278.

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16. Replication, that Re-  
lessor had not  
a right of en-  
try.

And the said D. says that the said A. B. at the said time of the making of the said supposed deed in the plea aforesaid mentioned, had not a lawful right of entry into the tenements aforesaid, with the appurtenances, as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

In this replication the demandant virtually admits that the relessor once had such a title as is alleged in the plea, and that he made the deed of release, but relies on the fact that from lapse of time, or some other cause, his right of entry was taken away at the time of making the release. If so, the release could not operate as an entry and feoffment, and would not have the effect supposed by the tenant in his plea.

In this, and in the two preceding replications, the demandant will always deny by way of protestation the two facts which are not traversed, if there is any doubt respecting them, so that he may not be concluded on those points in a writ of right; because such a writ will perhaps be more frequently brought by the party who loses in a case of this kind, than in most other cases of a writ of entry.

If the release was made by the demandant himself, or by an ancestor from, or through, whom the demandant deduces his title in the writ, it will be sufficient to say in the plea, that *the said D. or, the said F.* by his deed, &c. released to the tenant whilst he was seised of the premises; or if the release was made to one, under whom the tenant holds, to state that fact, alleging that the relessee was seised at the time, as in the above forms. It will be unnecessary to say any thing of the title of the relessor, or to aver that he had a right of entry. If made by an ancestor of the demandant who is not named in the writ, it will be necessary to show that the relessor was an heir of the person alleged to have been disseised; and that he had at the time of the release all the right which is supposed to have descended from the disseisee to the demandant. Suppose for example that the action is brought by a nephew as heir to his uncle, and the right is alleged to have descended directly from the uncle to the demandant, or to the demandant's father and from him to the de-

mandant; and the defence is that the uncle left a son who made the release in question; the plea would then be as follows:

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—that the said N. the uncle of the said D. in the writ aforesaid mentioned, had issue one O. of his body lawfully begotten, who survived him the said N.; and after the death of the said N. and whilst he the said T. was seised of the tenements aforesaid with the appurtenances, to wit, on the — day of — he the said O. did by his deed of that date, &c. (*as in the above form No. 12*).

17. Plea, Release by an ancestor of demandant, not named in the writ.

If the release was made to one who is not named in the writ, and whose estate the tenant has, the plea will be varied in this particular, to correspond to No. 13. *supra*.

## SECTION VI.

*That the Demandant is not the heir, or successor, of the person who is alleged to have been disseised.*

When the writ is brought on the seisin of an ancestor, it is a good defence to show that the demandant is not the heir of the person who is supposed to have been disseised. In an Assise of Mortdancestor the tenant might generally avail himself of this defence without any special plea; because one of the points of the writ, to be inquired of by the Assise, was whether the demandant was the next heir of the person last seised. In the writs of Ayel, Besayel and Cousinage, which are *Præcipes*, the tenant in ancient times could not plead simply that the demandant was not heir, &c. but he was required to show in his plea who was the heir (*d*). The effect of this was, that the tenant must point out the particular defect, on which he relied, in the title of the demandant, instead of putting him to prove his whole genealogy as alleged in his declaration. In Besayel for example, if the descent was traced from A. to G. from G. to F. and from F. to the demandant, the tenant could not plead that the

(d) 2 Inst. 399. 400. 6 Ed. 3. 55. (296.)

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demandant was not the heir of A. and thus compel him to prove that G. was the son of A. and F. the son of G. and the demandant the son of F.; but he must have pleaded that A. left a son older than G. to whom the land descended; or that G. left a son older than F., &c. or that A. left no such son as G. and that the land descended to B. as his brother and heir, &c.; in which cases the replication would be that A. did not leave such older son, or that he did leave the said G. his son and heir; and the issue would be confined to that point, instead of embracing the whole genealogy of the demandant. This seems to have been the whole effect of the ancient mode of pleading; so that if the tenant was required to show a title in himself under the person whom he alleged to be the heir, still that title could not be traversed, but the demandant must maintain his own title as set forth in his writ and declaration (e). This mode of pleading was altered by the statute of Westm. 2. c. 20. by which it is provided that the tenant in the three actions last mentioned may plead that the demandant is not the heir of the person last seised. Upon the issue joined on this plea the demandant must prove his whole genealogy, showing the descent to himself from the person last seised, as he has alleged it. The writs of entry on the seisin of an ancestor are substantially the same as the Assise of Mortdancestor, and the other three writs above mentioned, and in our practice are in all cases substituted for them; and there is no doubt that this would generally be a good plea in those writs of entry.

One ground, upon which the title of the demandant as heir might be impeached, was the illegitimacy of himself, or of some of the persons named, in tracing his descent, as heirs of their respective parents. As to this, the rule was, in the Assise of Mortdancestor, if not in the other actions above mentioned, that the tenant could not prove the bastardy of the demandant without pleading it (f); but as to any of the other persons named in tracing the descent, it seems that their illegitimacy might be proved without be-

(e) See Bro. Bar. 17. 11. H. 4. 56. (f) 2 Inst. 400. 35 Ass. 7.

ing specially pleaded. This distinction probably arose from the usual manner of trying the question of bastardy, which was by the certificate of the Bishop; and from the effects of that certificate. The issue upon a general plea of bastardy was not tried by the country, but by the Bishop; whose certificate was not only conclusive in that action, but, if the party was certified to be a bastard, it estopped him forever to deny that fact in any other suit (*g*). It was manifestly unjust that a stranger to the suit should be concluded in this manner; and it was accordingly settled that bastardy, when alleged in a stranger to the writ, should be tried by the jury (*h*). From the cases here cited it appears that the tenant did sometimes plead the bastardy of some person other than the demandant; but such a plea does not seem to have been necessary, at least not in the actions which are mentioned in the stat. Westm. 2. The design of that statute apparently was to put the demandant to prove the whole of his title as heir, when it was traversed, instead of requiring the tenant to point out any one defect, and to rely on that alone. As bastardy in any of the ancestors of the demandant through whom he claimed, was fatal to his title, and was triable by the same forum which tries all the other questions involved in the issue, there seems to be no reason why that ground of defence should not be open to the tenant upon the general plea before mentioned (*i*). By our law the question of bastardy is tried in all cases by the country; and if there was no reason for requiring it to be pleaded in the English courts, but what arose from the manner of trying the issue, it might perhaps be deemed unnecessary here to plead it in any case. Still, as such a plea would undoubtedly be good, whether necessary or not, I have proposed a form of that kind, as well as of the general plea, that the demandant is not the heir of the person last seised.

If it should be thought that the operation of the

(*g*) See Viner, Bastard (M.)

(*h*) Vin. Trial (O) pl. 13. 17. 19. (P) pl. 44. Bastardy (K) 11.

(*i*) See Viner, Bastard (K) pl. 5. 7. 8.

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statute above referred to was confined to the three actions therein mentioned, and that it did not extend to the writs of entry, it would probably be considered also that the ancient mode of pleading, as stated by Lord Coke in the place above cited, was likewise confined to the same three actions. If so, and if the tenant in a writ of entry was not required by any settled practice to state who was the true heir, when denying the heirship of the demandant, we may conclude from the general principles of pleading that he might traverse any one of the facts stated by the demandant in tracing his title by the descent, even if he could not directly traverse the whole in a general plea, that the demandant was not the heir, &c. There are precedents of such pleas in the books of entries in other actions, where either party makes title by descent. As in *Cousinage*, and *Detinue of Charters*, when a descent is traced from A. to I. his son, or from W. to S. his brother, it is a good answer to say that A. had no such son as I. or that W. had no such brother as S. (*k*). The plea in this form does not admit that any such person as I. or S. ever existed. If it had been alleged that I. was not the son of A. thereby admitting that such a person as I. had existed, it was considered necessary to say whose son he was (*l*); though it may be difficult to see any advantage from introducing that averment, as the plea must conclude with a traverse that I. was the son of A. and the issue must be taken on this point alone. When the plea applies to the demandant, as that he is not the son of the person named as his father or mother, the plea, according to the rule above mentioned, must state whose son he is, because the existence of such a person is not questioned (*m*).

As a plea of this description in a writ of entry, would probably be good, if not necessary, I have added a form of this kind also; leaving it to the pleader to select the one which he shall think best.

(*k*) Rast. Ent. 211. 213. 538. 50. But see Keilw. 59.

(*l*) Viner, Heir (L) pl. 5. Bro. Sci. Fac. 62.

(*m*) Rast. Ent. 581.

When the writ is founded on the seisin of the demandant's father, the only objections to his title as heir, must be, that he is not the son of the person named as his father, or that he is illegitimate, or otherwise incapable of taking the estate as heir of his father. In this case it seems to have been considered proper to allege distinctly in the plea, that the demandant is not the son, &c. or that he is a bastard, &c. and not to plead generally, that he is not the heir.

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The plea, that the demandant is not the son of the person named in the writ as his father, may be as follows :

And now the said T. comes and defends his right when, &c. and says that the said D. his action aforesaid thereof against him ought not to have or maintain, because he says that the said D. is the son of one J. S. and not the son of the said F. as he the said D. has above in his writ and declaration aforesaid alleged ; and this he the said T. is ready to verify : wherefore he prays judgment if the said D. his action aforesaid thereof against him ought to have or maintain ; and for his costs.

18. Plea, that demandant is not the son of the said F. who is named as his father.

I have concluded this plea with a verification, instead of concluding it to the country, in compliance with the ancient forms. But it seems to be now well settled that a conclusion either way would be good (*m*) ; and if so, it is undoubtedly better to conclude to the country, as it avoids prolixity in the pleadings.

Replication :

And the said D. says that he ought not, by any thing by the said T. above in pleading alleged, to be barred from having and maintaining his action aforesaid thereof against the said T. because he says that he is the son of the said F. as he has above in his writ and declaration aforesaid alleged ; and this he the said D. prays may be inquired of by the country.

19. Replication, that he is the son of F.

The plea, that the demandant is a bastard, may be as follows (*n*) :

(*m*) See 1 Chit. on Plead. 538, and the books there cited.

(*n*) Rast. Ent. 289.



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20. Plea, that  
demandant is  
a bastard.

And now the said T. comes and defends his right when, &c. and says that the said D. his action aforesaid as heir of the said F. ought not to have or maintain, because he says that the said D. is a bastard; and this he is ready to verify: wherefore he prays judgment if the said D. his action aforesaid thereof against him ought to have or maintain, and for his costs.

Or as follows (o):

21. *Alien.*

—when, &c. and says that the said D. cannot be the heir of the said F. because he says that the said D. is a bastard; and this he is ready to verify: wherefore he prays judgment if the said D. ought to have or maintain his action aforesaid as son and heir of the said F. thereof against him the said T. and for his costs.

In this plea in the English books, it is added, after the averment that D. is a bastard, “that he was born at A. in the county of B. in such a diocese.” This is done on account of the mode of trial there, by the certificate of the Bishop; and the averment is unnecessary in our practice.

The replication, to the plea in either of the above forms, is as follows:

22. Replication, that he is  
legitimate.

And the said D. says that he ought not, by any thing by the said T. above in pleading alleged, to be barred from having and maintaining his action aforesaid thereof against the said T. because he says that he the said D. is the lawful issue of the said F. and not a bastard, as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

If the defence is that the demandant is an alien, and therefore incapable of taking as heir, the plea may be as follows:

23. Plea, that  
demandant is  
an alien, and  
not heir.

And now the said T. comes and defends his right when, &c. and says that the said D. cannot be the heir of the said F. because he says that the said D. is an alien, born in foreign parts, out of the allegiance of this Commonwealth, and of each and every of the United States, and within the allegiance of the king of France, to wit, at P. in the kingdom of France; and this he the said T. is

ready to verify : wherefore he prays judgment if the said D. ought to have or maintain his action aforesaid as son and heir of the said F. thereof against him the said T. and for his costs.

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I have not found any precedent of such a plea in the books of entries, and have framed this by analogy to the plea of incapacity arising from bastardy. As it is an established rule that aliens are incapable of taking by descent, it follows necessarily that the tenant may plead that fact in bar, when the demandant claims as heir, in like manner as he may plead any other fact which shows that the demandant is not the heir of the person from whom he claims.

The demandant may reply to this plea in the same manner as to the plea of alienage in disability of the person (*p*) ; altering only the beginning and conclusion of the replication, to adapt it to a plea in bar.

The plea, that the demandant is not the heir of the person who is said to have been disseised, may be as follows :

And now the said T. comes and defends his right when, &c. and says that the said D. is not the heir of the said A. B. as he has above in his writ and declaration aforesaid alleged ; and of this he puts himself on the country.

24. Plea, that demandant is not heir.

I have seen but one precedent of a plea of this kind, and that is in a formedon in descender, in Herne's Plead-er, 414. If it should be deemed to be a good plea in the writs of entry, it might be used in every writ that is founded on the seisin of an ancestor, excepting perhaps the case when that ancestor is stated to be the father of the demandant.

Whether the tenant is, or is not, permitted thus to traverse the demandant's title generally, he would probably be allowed to put in issue any one of the facts stated by the demandant in tracing his descent, or to plead that any one of those through whom the descent is traced was a bastard.

A plea of the first description, adapted to the count No. 12. *supra*, Chap. II. might be as follows :

(*p*) See *sup.* Chap. III. pl. 1.

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25. Plea, that  
G. had no such  
son F.

And now the said T. comes and defends his right when, &c. and says that the said G. had no such son as F. who is named in the writ and declaration aforesaid; and of this he the said T. puts himself on the country.

Or the plea may state who was the father of F. and traverse that F. was the son of G.; concluding with a verification, as in the above form, No. 18. in this chapter.

To the count No. 14. supra, Chap. II. the plea would be,

26. Plea, that  
N. had no such  
brother B.

—that the said N. had no such brother as B. who is named in the writ and declaration aforesaid; and of this he the said T. puts himself on the country.

The plea of bastardy in any of those through whom the descent is traced, might be as follows :

27. Plea, bas-  
tardy in one  
through whom,  
&c.

And the said T. comes and defends his right when, &c. and says that the said D. his action, &c. because he says that the said F. through whom the right to the tenements aforesaid with the appurtenances is in the writ and declaration aforesaid alleged to have descended to the said D. was a bastard, so that no right could descend to the said D. through (or, by means of) the said F. and this he the said T. is ready to verify: wherefore he prays judgment if the said D. his action aforesaid thereof against him the said T. ought, &c.

## Replication :

28. Replica-  
tion, that he  
was legitimate.

And the said D. says that he ought not to be barred, &c. because he says that the said F. was legitimate, and not a bastard, as the said T. has above in his said plea alleged; and this he prays may be inquired of by the country.

## SECTION VII.

*Mistake of the Estate.*

When the demandant sues as heir, it may be that his ancestor was seised, and that the demandant is the heir, but that the estate which the ancestor had in the premises was less than a fee-simple. The tenant might proba-

bly avail himself of this defence under the general issue; but as it may be thought advisable sometimes to plead it specially, I subjoin the form of such a plea.

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And now the said T. comes and defends his right when, &c. and says *actionem non*, &c. because, protesting that the said F. the father of the said D. never had any thing in the said demanded premises, for plea he says that the said F. never had any thing in the said demanded premises unless to him and the heirs of his body issuing; (or, unless for the term of his life;) and this he the said T. is ready to verify: wherefore, &c. (q)

29. Plea, that demandant's father had nothing, unless in tail, &c.

Perhaps the protestation in this plea would not be necessary in any case. It certainly would be seldom useful; as the tenant would have no motive for making the plea, unless he knew or believed that the ancestor was seised in tail, or for life. If the ancestor had an estate tail, the only effect of the plea, if maintained, would be to drive the demandant to his action of formedon in descender. The only case therefore in which it could be of any advantage to the tenant to make this plea, is when the writ of Formedon is barred by the Statute of Limitations, whilst the writ of entry on the seisin of an ancestor is not barred.

Replication.

And the said D. says that the said F. his father was seised of the said demanded premises in his demesne as of fee-simple, as he has above in his writ and declaration aforesaid alleged; and this he prays may be inquired of by the country.

30. Replication, that he was seised in fee.

## SECTION VIII.

### *Of Aid, and Receipt.*

These are not pleas, either to the writ or the action; but as they are suggestions, or entries, that may be made in the course of the defence, they may be not improperly introduced in this place.

When in any action against a tenant at will, for years,

(q) See Rast. Ent. 28. 4 Ed. 3. 139. (P. 4 Ed. 3. pl. 27.)

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or for life, the title of the inheritance came in question, the defendant or tenant might pray aid of him who had the reversion or remainder. No real action could be maintained against a mere tenant at will, or for years; and therefore I omit the aid-prayer by them. When a real action is maintained against persons who claim only an estate at will, or for years, it must be on account of some act of their own, which makes them disseisors at the election of the demandant; and every such disseisor is deemed to have a fee-simple. But in writs of entry in which the inheritance is demanded against a tenant for life, the latter may always pray in aid of the reversioner or remainder-man (*r*).

The demandant might counterplead the aid; and if the issue on such counterplea were found for him, the judgment thereon was final; but if the prayer in aid was disallowed on demurrer, the judgment was, that the tenant should answer alone (*s*). In these respects it was treated like a common plea in abatement.

If the prayer in aid were allowed, the prayee in aid might appear *gratis*; and if he did not, a *summoneas ad auxiliandum* was issued against him. If he refused to appear, the tenant was required to answer alone. If he appeared, he joined with the tenant in the defence, without any new count by the demandant.

As this suggestion is seldom used, and is never necessary, in writs of entry, I shall give merely a single form of the entries and proceedings in such a case (*t*).

31. Prayer in aid by tenant for life, of him in the remainder.

And now the said T. comes and defends his right when, &c. and says that one G. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and being so thereof seised did by his deed by him duly signed, sealed and delivered, give and grant the same to him the said T. to have for the term of his life, the remainder thereof after the death of him the said T. to one S. A. of — and his heirs forever; by force whereof he the

(*r*) Com. Dig. Aid. (B. 4. 5. 6.)

(*s*) 2 Bos. and Pul. 384.

(*t*) If a writ of right be brought against a tenant for life, and he join the mise on the mere right, that is a forfeiture of his estate; in that action therefore he ought to pray in aid of the reversioner.

said T. was seized of the said tenements with the appurtenances in his demesne as of freehold : and so the said T. says that he has nothing in the said tenements with the appurtenances unless for the term of his life only [or, that he holds, and on the day of the purchase of the original writ in this action did hold, the said tenements with the appurtenances for the term of his life only] the remainder thereof to the said S. A. and his heirs belonging ; without which said S. A. he the said T. cannot draw into plea the tenements aforesaid with the appurtenances [or, cannot bring into judgment a plea of the tenements aforesaid with the appurtenances] nor answer the said D. thereof ; and he prays aid of the said S. A. ; and it is granted to him (u).

If the prayee in aid appears *gratis*, the entry proceeds as follows :

Whereupon the said S. A. being present here in court in his proper person, freely joins himself to the said T. in aid against the said D. in the plea aforesaid ; and thereupon the said T. and S. A. say that the said G. did not disseise the said D. of the tenements aforesaid with the appurtenances, in manner and form as the said D. has above in his said writ and count alleged : and of this they the said T. and S. put themselves on the country (x).

32. Joinder in aid, and plea.

Instead of the general issue, the parties may vouch, or make any other plea that is suited to their case.

If the prayee in aid does not voluntarily appear, a summons is issued to him ; which in the English practice is preceded by an award or order of the court for the issuing of the writ ; as follows :

Therefore let the said S. A. be summoned, [or, Therefore the Sheriff is commanded that he summon the said S. A.] to be here on such a day to join together with the said T. in answering the said D. in the plea aforesaid, if he see fit, &c. (y).

The summons is as follows :

The Commonwealth to the Sheriff, &c.

Whereas D. of — in our Court of C. P. &c. begun and held, &c. demanded against T. of — a certain piece of land in — bounded, &c. into which the said T. had no entry but by, &c. as

33. Summons ad auxilium jungendum.

(u) Rast. 26. 27. (x) Rast. 283. (y) 2 Saund. 45. c. note.

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the said D. said : And the said T. afterwards came into our said court and said that one G. was seised, &c. (*as in the prayer in aid, to the end—*) and it was granted to him : We command you therefore that you summon the said S. A. if he may be found within your precinct, to appear before our justices of our said court, &c. on — to join together with the said T. in answering the said D. in the plea aforesaid if he see fit : And have you there this writ, &c. (z).

The counterplea of the aid-prayer is as follows :

34. Counter-  
plea of aid,  
that prayee  
has nothing,  
&c.

And the said D. says that the said T. ought not to have aid of the said S. A. because he says that the said S. A. has nothing in the remainder of the said tenements with the appurtenances ; and this he is ready to verify : wherefore he prays judgment, and that the said T. may be precluded from having aid in this behalf of the said S. A.

35. Replica-  
tion.

And the said T. says that he holds the said tenements with the appurtenances for the term of his life, the remainder thereof to the said S. A. and his heirs belonging ; as he the said T. has above alleged ; and of this he puts himself on the country. .

This prayer of aid must be made before a general imparlance ; and if made afterwards, it will be overruled on demurrer, and the tenant will be required to answer alone (a).

It seems to have been sometimes doubted whether the tenant could have aid, contrary to the supposal of the writ ; as for example, when he is supposed to have no entry but by A., whether he could allege a gift to himself for life from B., and pray in aid of B. It has been repeatedly decided that he could not have aid in such a manner as *necessarily* falsified the writ ; but his proper course was, to plead the mistake of the entry ; and when that mistake was rectified, he might pray in aid of the person by, or under, whom he held. But in consequence of the doctrine of disseisin at election, it would often happen that the tenant might be a disseisor to the demandant, though he really held an estate for life, by the

(z) Rast. 271.

(a) 2 Bos. & Pul. 384.

grant of some other person. This probably induced the courts to extend as far as possible the allowance of aid-prayer; in which they might also be further encouraged by the opinion, that the allowance, where it was not allowable, was not error, though it was error to refuse it, where it ought to be allowed (*b*). We find accordingly that it was allowed in some instances, where it seems to have falsified the entry; as may be seen in some of the numerous cases collected from the Year Books in 1 Rolle's Abr. 161 to 165. But in many of those cases the courts recognised the principle, even when they seemed to violate it, by saying that it was *possible* that the allegation made by the tenant might *stand with the writ*; as for example, when the tenant had disseised the demandant, he might have afterwards enfeoffed a stranger, and then have taken back an estate for life; in which case the demandant would still be authorised to consider him as the disseisor. If there be any cases which cannot be thus reconciled, they will not, I apprehend, be sufficient to outweigh the authority of the cases to the contrary which are above mentioned, supported as the latter are by the rules respecting a mistake of the entry (*c*).

So it is a good counterplea of aid-prayer, to traverse the demise set forth by the tenant (*d*); or to say that the tenant was seised in fee at the commencement of the action (*e*); or any thing which shows that the prayee in aid has not such an estate as is alleged. The reader who may wish to examine this subject further, is referred to the Abridgments of Fitzherbert and of Brook, under the titles, Aid, and Counterplea of Aid; and to the title Aid, in Viner and Rolle.

#### *Receipt.*

If the tenant for life, when impleaded in a writ of entry, does not pray in aid of the reversioner or remainder-

(*b*) 21 E. 4. 51. 5 H. 7. 8. 14 H. 6. 5. 6. 7 E. 4. 12. b.

(*c*) See *supra*, Chap. III. sect. 18. (*d*) Rast. 27.

(*e*) Fitz. Count. of Aid, 2. ●



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man, but is defaulted, or is ready to suffer judgment by *nil dicit*, &c. or pleads collusively by covin with the demandant, the reversioner or remainder-man may pray to be received to defend his inheritance; and if he appears before judgment against the tenant, and shows sufficient cause, he will be admitted accordingly. This remedy is provided by the statute Westm. 2. c. 3; but Bracton, whose opinion Lord Coke seems to adopt, says that the common law furnished the like remedy to the reversioner (*f*). By the common law, after such a recovery against the tenant for life the reversioner was driven to his writ of right; but by the statute last cited, he may recover in a writ of entry. Lord Coke says that this is to be understood of a writ of entry *ad communem legem*, which cannot be brought till after the death of the particular tenant (*g*); and in this he follows the Register, 235, which he cites. There cannot be two higher authorities upon such a point; but if it had been a new question, we might have supposed that a writ *in casu proviso*, or *in consimili casu*, would also lie in such a case; because the recovery suffered in this manner by the tenant for life is considered as a *demise* by him, and therefore a forfeiture of his estate. The reversioner, in bringing his action *ad communem legem*, counts upon a *demise* in the usual form; and if the demise is traversed, the demandant maintains his count by a special replication setting forth the recovery; and he might do the same in either of the other two actions.

This remedy, by the receipt of the reversioner or remainder-man, is seldom resorted to, and cannot often be useful, in our practice. I subjoin one short form of the entries in such a case.

36. Receipt of reversioner, on default of tenant for life.

And now the said T. being solemnly called, comes not, but makes default: And thereupon A. R. of — comes here into court in his proper person, (or, by A. B. his attorney for this purpose specially constituted (*h*),) and says that the said T. has nothing, and at the commencement of this action had nothing, in the said demanded premises but for the term of his life only, by force of a demise

(*f*) 2 Inst. 344. (*g*) 2 Inst. 346. (*h*) See Rast. 375. a. 698. a.

made to him for the term aforesaid by the said A. R. the reversion thereof to him the said A. and his heirs belonging; and this he is ready to verify: wherefore, inasmuch as (or, and says that he the said A. was seised of the said demanded premises in his demesne as of fee, and being so thereof seised before the commencement of this action demised the said premises to the said T. to have for the term of his life, saving the reversion thereof to him the said A. and his heirs forever; by force whereof the said T. was seised, and still is seised, of the said premises in his demesne as of freehold; and so the said A. says that the said T. has nothing, and at the commencement of this action had nothing, in the said demanded premises but for the term of his life only, the reversion thereof after the death of the said T. to him the said A. belonging in manner aforesaid; and this he is ready to verify: wherefore, inasmuch as) he comes here into court before judgment rendered in the action aforesaid, ready to defend his right, and to answer in this behalf to the said D., he prays that he may not lose his right by the default of the said T. but that he may be admitted to the defence of his right in this behalf. And he is admitted accordingly: and thereupon the said D. demands against the said A. R. the tenements aforesaid with the appurtenances as his right and inheritance, and into which the said T. had no entry but by one F. &c. (*as in the original count,*) (i).

When the wife is received, on the default of her husband when they are impleaded together, the demandant does not count anew against her, as she was already a party to the suit; and it has been said that such new count was not necessary against a reversioner or remainder-man (k). But a contrary opinion was expressed in another case in the same year (l); and again in the 43 Eliz. (m). Some of the precedents in Rastel have a new count in such case, and in some it is omitted.

After the new count against the party received, or immediately on his appearance, if no new count is filed, he must plead in like manner as if he had been originally the tenant to the writ.

In the case above supposed, the suffering of a default

(i) Rast. 140. 248. 285. 372. and seq. 581.

(k) Moo. 34. in 3 Eliz. (l) Moo. 29.

(m) Cro. El. 826. and see Com. Dig. Receipt (B. 2.)

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by the tenant is sufficient to authorize the receipt of the reversioner, without the allegation of any other cause; but when the original tenant has appeared and pleaded, the reversioner must allege that he has pleaded collusively, or feintly, by covin with the demandant, in order to cause him, the reversioner, to lose his right. Precedents of this kind will be found in the different places before cited from Rastel.

The demandant may counterplead the prayer to be received; as follows:

37. Counter-  
plea of Re-  
ceipt, that he  
has nothing,  
&c.

And the said D. says that he ought not to be delayed from having his seisin of the said demanded premises, nor ought the said A. R. to be admitted to defend any right (*or*, his right) in the said premises, by reason of any thing by the said A. above alleged, because he says that the said A. has nothing, [and on the day of the purchase of the original writ in this action had nothing,] in the reversion of the said demanded premises; and this he is ready to verify: Wherefore the said D. prays judgment, and that seisin of the said demanded premises may be adjudged to him, with his costs.

38. Rejoinder.

And the said A. R. says that the reversion of the said demanded premises, after the death of the said T. [did, on the said day of the purchase of the original writ in this action, and still] doth belong to him the said A. in manner and form as he has above in that behalf alleged: and of this he puts himself on the country.

In the English practice, when the reversioner or remainder-man was received, he was required to give sureties to answer to the demandant for the issues and profits of the demanded premises, from the time of the receipt till the final judgment, if that judgment should be for the demandant (*n*). I am not aware that sureties have ever been required in our courts; and as no damages are ever recovered here in real actions, under any other circumstances, it is not probable that they would be awarded against the party so received.

In the above counterplea I have averred that the party had nothing in the reversion *on the day of the purchase of the writ*, in conformity with the ancient precedents, al-

(*n*) 2 Inst. 346. Rast. 581.

though it seems unnecessary; for if the reversion existed before, and comes to the party after the commencement of the action, he is entitled to be received (*o*). So on the other hand, if he had the reversion at the commencement of the action, yet if he has it not at the time of his appearance, he cannot be received. This shows that the rejoinders in Rastel, to wit, "that he had the reversion on the day of the writ purchased," are incorrect; because, if that issue were found against him, it would not follow that he ought not to be received (*p*). I have therefore added to the rejoinder the averment, that the reversion *still doth* belong to him; and I should think the rejoinder better, and the counterplea also, if the clauses enclosed in brackets were struck out.

## SECTION IX.

*Judgment.*

The Judgment, when the demandant recovers the demanded premises, is as follows:

It is therefore considered by the Court here that the said D. do recover his seisin against the said T. of the tenements aforesaid with the appurtenances, together with his costs of this suit taxed at —

39. Judgment  
for demand-  
ant.

The judgment for the tenant is the same as in personal actions.

— that the said D. take nothing by his writ aforesaid, and that the said T. go thereof without day; and that the said T. recover against the said D. his costs of suit taxed at —

40. — for ten-  
ant.

The statute 1784, c. 28, gives the form of a writ of "*Facias habere Possessionem*," in which it is recited that A. B. "has recovered judgment for his title and possession

(*o*) Bro. Receipt, 57. Counterplea de Receipt, 9. 19 H. 6. 21. 21 H. 6. 13. and other cases collected in Viner, Receipt. (M.) [P.] See Herne's Plead. 379. [475.]

(*p*) Bro. Count. de Receipt, 9.

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of and in a certain messuage," &c. ; and there is no other form of execution prescribed in the statute for the case of the recovery of land. This form had probably been in use long before the date of the statute, and was adopted when the process in real actions was very little regarded in our practice, and when all such actions were called by the general name of actions of Ejectment. If the execution in all real actions must always be issued in that form, it would probably be thought proper to make the entry of the judgment correspond with the above recital of it in the execution. But as the statute does not expressly prohibit any other form of execution, there seems to be no objection to awarding the judgment and execution in writs of entry in the forms prescribed by the common law.

The judgment on pleas in abatement is substantially the same as in personal actions, unless when it is a final judgment for the demandant ; in which case it is the same as in the above form, pl. 39.

## CHAPTER V.

## SECTION I.

*Writ of Entry on Abatement.*

THE Writ of entry on Abatement, when the demandant is the immediate, or next, heir of the person last seised, and when the present tenant is the abator, may be in the form following :

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Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. such a piece of land, &c. which he claims as his right and inheritance, and into which the said T. unjustly abated after the death of one F. the father of the said D. whose heir he is, within thirty years now last past, as it is said. And whereupon the said D. says that within thirty years now last past the said F. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee and right, taking the profits, &c. and afterwards died so seised thereof ; and from the said F. the tenements aforesaid with the appurtenances descended to the said D. who now demands the same as the only child and heir of the said F. and into which the said T. unjustly abated as aforesaid (a).

1. Entry on  
abatement af-  
ter the death  
of the father.

The form of the count here proposed differs in some respects from the precedent in 2 H. Blacks. 444. It is said here, that the *land* descended from the ancestor to the heir, and not, that the *right* descended. When the ancestor is disseised, and dies before re-entry, he dies seised of a right only ; and this right is all that can descend to his heir. Accordingly in a writ of entry on a disseisin to an ancestor, it is always alleged that the right descended. But when the ancestor dies seised of the land, the

(a) See Co. Ent. 597.

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land immediately descends to the heir; the freehold in law is cast upon him, and it is not merely a right of action that he derives from his ancestor (*b*). This precedent in H. Blackstone is the only one that I have met with, of a writ of entry on abatement; and it does not appear in the report of that case that the form of the count was at all considered by the court. I have therefore ventured to propose this alteration, for the reasons above suggested; although it may not be of much importance, nor involve any practical consequences in the prosecution of the suit. The precedent in Blackstone differs also in some other particulars from the ancient forms adopted in analogous cases. It contains an averment of the time when the ancestor died; and that the heir was then within age; and the entry of the abator is distinctly averred in the body of the count, although it also contains the usual repetition of that fact at the close, by the clause "and into which," &c. All these I have omitted.

If the ancestor were seised of an estate for the life of another, which by our statute 1805, c. 90, descends to his heir, there seems to be no doubt that this writ would lie for the heir against an abator. The count in that case might perhaps retain the clause, "which he claims as his right and inheritance," because this is strictly true by force of our statute. The demandant claims it by inheritance, although it is only an estate for life; resembling in some measure a base, or qualified, fee at the common law. The estate and seisin of the ancestor may be set forth as follows:

2. The like,  
for an estate  
pur autre vie.

—in his demesne as of freehold and right, that is to say, for the term of the life of one A. B. who is still in full life, taking the profits, &c. of the demise which the said A. B. (*or*, which one C. D.) thereof made to the said F. for the life of the said A. B. and afterwards the said F. died so seised thereof; and from the said F., &c.

(*b*) In Rast. Ent. 28. and seqq. tit. Ayel, Besayel and Cousinage, in all the counts in which it is averred that the ancestor *died seised*, the statement is that the *fee* descended (*descendit feodum*) to the heir; but when the ancestor is said merely to have been seised on the day of his death, the statement is that the *right* descended to the heir.

If the ancestor dies seised of an estate tail, and a stranger abates, this writ might seem to be a more appropriate remedy for the heir, than a writ of formedon in descender. In such a case, the estate tail is not discontinued and turned to a right in the life time of the ancestor. The land, and not a mere right, descends to the heir. The heir could not indeed maintain an assise of mortdancestor, because one of the points to be inquired of, according to the terms of that writ, is whether the ancestor was seised in his demesne *as of fee* on the day wherein he died; and unless this is found for the demandant he cannot recover (*c*). This writ of Mortdancestor, and the other corresponding writs, of Ayel, Besayel and Cousinage, superseded in ancient times the use of the writ of entry on abatement; and this is the reason why we find so little in the English books on the subject of the latter action. If it had been in common use, it might perhaps have been sometimes resorted to by an heir in tail, and we might have found a precedent adapted to such a case (*d*). It seems however to be well settled, that since the statute *de donis*, the heir in tail may always have a formedon in descender, in cases where before that statute his remedy would have been a mortdancestor; and a formedon is equally convenient, and answers every purpose of a writ of entry on abatement.

If the action is brought by a more remote heir of the person last seised, the form will vary accordingly. On the seisin of a grandfather it may be as follows :

—and into which the said T. unjustly abated after the death of one G. the grandfather of the said D. whose heir he is within thirty years now last past, as it is said. And whercupon the said D. says that within thirty years now last past the said G. was seised, &c.—and afterwards died so seised thereof; and from the said G. the tenements aforesaid with the appurtenances [*or*, the fee of the tenements aforesaid with the appurtenances] descended to one F. as only child and heir of the said G. and from the said F. [the

3. — on abatement after the death of the grandfather.

(*c*) F. N. B. 196. Plow. Com. 239. 251.

(*d*) See 38 H. 6. 18. Fitz. Issue, 106. Bro. Traverse, 159. Pleadings, 56. 59. 39 H. 6. 5.



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fee of] the tenements, &c. descended to the said D. who now demands the same as the only child and heir of the said F. and into which, &c.

If in the preceding case the father had died before the grandfather, the descent would be alleged immediately from the grandfather to the demandant as in the form No. 13, Chap. II.

If the present tenant holds by conveyance or descent from the abator, the writ is in the *per* ; and the entry is stated as follows :

4. — in the  
*Per.*

—into which the said T. has no entry but by one S. who demised the same to him, and who unjustly abated into the same after the death of one F. the father of the said D. whose heir he is, &c.

In the *per and cui*, the form is,

5. — in the  
*Per and Cui.*

—into which the said T. has no entry but by one R. to whom one S. demised the same ; which said S. unjustly abated into the same after the death of one C. the cousin of the said D. whose heir he is, &c.

In the *post*,

6. — in the  
*Post.*

—into which the said T. has no entry but after the abatement which one P. made into the same after the death of, &c. (and at the close of this count is added the clause, "*et unde queritur*," &c. as in all writs of entry in the *Post* ; viz.) and whereof the said D. complains that the said T. unjustly deforces him.

## SECTION II.

*Pleas in writs of Entry on Abatement.*

The pleas in abatement in this action are substantially the same as those in the writ of entry on disseisin ; and may be readily made by reference to the forms in Chapter III.

The pleas in bar also in Chapter IV. so far as they are common to both actions, may be adopted with little alteration from the forms in that chapter.

The only precedent that I have found of this action in any English book is the case before mentioned, in 2 H. Blacks. 444 ; and in that case the tenant pleads in bar a devise by the ancestor, on whose seisin the action is founded, to the supposed abator ; and the issue was joined on that devise. There is no plea there which purports to be the general issue. Neither can we find any plea of that description in the actions of Mortdancestor, Ayel, Besayel and Cousinage ; which in ancient times were used instead of this writ of entry on Abatement. Neither of those four writs contained any allegation of an abatement on the part of the tenant ; nor indeed did they make any statement whatever of the manner of his entry.

The mortdancestor is an assise, in which the jury came to inquire and determine, 1st. whether A. was seised of the demanded premises on the day of his death ; 2dly. whether he died within fifty years ; and 3dly. whether the demandant was his heir. If the assise was taken, that is, if it was not prevented by some plea *in bar of the Assise*, the recognitors or jury inquired of all those three points, and unless they were all found for the demandant he could not recover : and this was done without any formal traverse of those points by the tenant (e).

The writs of Ayel, Besayel and Cousinage, are all Præcipes, for tenements “ of which G. the grandfather, (great-grandfather, or cousin) of D. (the demandant) whose heir he is, was seised in his demesne as of fee on the day of his death.” In the count, he demands such a messuage, &c. “ of which the said G. his grandfather was seised on the day of his death, as it is said : And whereupon he says that in a time of peace, within fifty years now last past, the said G. was seised of the said demanded premises in his demesne as of fee, taking the profits, &c. and from the said G. the right to the tenements aforesaid descended to the said D. as grandson and heir of the said G. that is to say, as the son of one F. who was the son of the said G. ; and of which the said

(e) 2 Inst. 399. Dyer, 310.

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G. was seised as aforesaid" (*f*). In some of the precedents it is alleged that the ancestor died seised, and that the *fee* of the premises descended to the demandant. These actions present substantially the same three points as the mortdancestor, but the tenant could not put them all in issue by any one general plea, or answer. He might plead that the ancestor was not seised in fee, as alleged in the count; which would probably involve also the question, whether he was so seised within the fifty years; or he might deny that the demandant was his heir. But if both of those facts were truly stated in the count, and the tenant meant to rely on some right of entry in the supposed abator, he must have set forth that right in a special plea. This mode of pleading was a necessary consequence of the form of the count; for as that did not allege any unlawful entry on the part of the tenant, there could not be any general plea, or general issue, calculated to deny the unlawfulness of the entry, or to assert a right of entry in the tenant, or the person under whom he held.

But though I have not found any plea traversing the abatement, when set forth in the writ on abatement, there are many cases where an entry by way of abatement is alleged in the course of pleading, and it has been held to be a good answer, to say that "he did not abate," &c. In 38 H. 6. 18, which was a writ of entry on disseisin, the tenant pleaded that one T. was seised, &c. and enfeoffed A. and D. under whom the tenant held, and gave colour, &c. The demandant replied that before the said A. and D. had any thing in the premises, one L. was seised, &c. and gave the premises to V. and D. in tail; that they died seised, leaving issue the present demandant, and after their death the said T. abated and made the feoffment to the said A. and D. as alleged in the bar. The tenant rejoined, that the said T. did not abate, &c. It was objected that the rejoinder ought to have traversed the seisin of L. or the gift by him, and not the abatement; but it was answered, and resolved by the court,

(*f*) See Rast. Ent. 28.

that the traverse was right; "for the abatement was the destruction of the bar; for *if he did not abate, but was lawfully seised*, and made the feoffment, then the bar is good." This is evidently the opinion of the court, though it is obscured by some misprinting. The replication in this case corresponds to the count in the writ on abatement; and the rejoinder, "that he did not abate," seems to be considered equivalent to saying, that he entered lawfully and by good title, like the plea of *non disseisivit* in entry on disseisin. There is another case, in 39 H. 6. 5, in which a like plea was held good. That was a formedon in descender on a gift by one J. The tenant pleaded that before the said J. had any thing, &c. one H. was seised, &c. and gave to the tenant's ancestor in tail; that his ancestor died seised, and the said J. abated, &c. The demandant replied that the said J. did not abate, &c. on which issue was joined; and though some question arose on another part of the pleadings, no objection was made to the form of that replication. These two cases are abridged, and mentioned by Fitzherbert, and in different places by Brooke, without any intimation of a doubt of their correctness (g). So in 1 E. 4. 9, in an action on the statute of Richard 2, the defendant pleaded a feoffment made to him by one I. The plaintiff replied that one L. died seised in fee, and the said I. abated, &c. and made the said feoffment to the defendant; whereupon one H. the cousin and heir of the said L. entered and enfeoffed the plaintiff. The rejoinder was that before the said L. had any thing in the premises, one S. was seised, and enfeoffed the said L. and I. in fee, and L. died seised, and I. held himself in, and enfeoffed the defendant, as before alleged; *without this that the said I. abated*, &c. It was objected that the traverse was ill, because the defendant had already confessed and avoided the entry set forth in the replication; that is, he had admitted that I. had the first possession after the death of L., but said that I. held himself in after the death, (by right of survivorship)

(g) Fitz. Issue, 106. Bro. Pleadings, 56. 59. Titles, 14. Traverse per sans ceo, 159.

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which is a lawful justification (*h*). And thereupon the defendant withdrew the traverse, and concluded his rejoinder with a traverse that L. died seised in fee; which was understood as a denial that he died *sole* seised. It seemed to be taken for granted in this case that the title, or right of entry, in I. as set forth in the rejoinder, constituted a sufficient answer to the allegation of an abatement by I.; and if so, the same facts, if proved under a plea that he did not abate, would probably have maintained that issue on the part of the defendant. It seemed also to be considered, that if the defendant had undertaken in that rejoinder merely to deny the abatement, he might have done it by the traverse in the above form; as the objection to the rejoinder was, not that the traverse was informal, but that having confessed and avoided the replication, the defendant ought not to have made any traverse. This case also is noticed, without any suggestion of a doubt of its correctness, by Fitzherbert and Brooke (*i*). There are other cases on this subject for which the reader is referred to the books cited in the note (*k*).

There is however a case in 18 E. 4. 1. and 25. and another, Ibid. 26. where a distinction seems to be taken between a traverse of the abatement, and a traverse that the ancestor died seised; and it is said that the party may traverse either at his election. This admits that the first mentioned traverse would be good; and for aught that appears in the reports, the party who alleges the abatement would be required on the trial to prove the seisin of the ancestor. The opinion expressed in these two cases would only show that when a title is pleaded, consisting of several distinct material facts, the adverse

(*h*) See Yelv. 151. Brownl. & Goldsb. 144. S. C. Cro. Jac. 221. S. C.

(*i*) Fitzh. Issue, 110. Bro. Traverse per sans ceo, 205. Briefe, 343. Confess and avoid, 61.

(*k*) 11 E. 4. 9. 22 H. 6. 43. 37 H. 6. 5. 3 H. 7. 7. Fitz. Barre, 106. Maintenance de Briefe, 26. Bro. Replication, 20. Pleadings, 27. Repleader, 25. Traverse per sans ceo, 178.

party sometimes has his option, either to deny the whole title by a general plea, or to traverse any one of the several facts.

If such a general plea were allowed in any case, it would seem to be peculiarly proper in a plea in bar, which is intended to answer and deny the gist of the action, and to put in issue the title on which it is founded. As in disseisin, any thing which shows that the entry complained of was not a disseisin, whether by reason of the defective estate or title of the demandant, or of a better title in the tenant, may be given in evidence under the issue, "that he did not disseise;" so probably in this action, whatever shows that the entry complained of was not an abatement, might be given in evidence on the plea "that he did not abate;" whether the ground of defence were, that the ancestor did not die seised of any estate on which an abatement could be made, or that the supposed abator had a right of entry.

The word, abatement, is a technical term, the meaning of which seems to be as well settled as that of the word, disseisin. It takes place when a person dies seised of an inheritance, and before the heir enters, a stranger, who has no right, makes an entry and gets possession of the freehold (*l*): and in the two cases above cited, from 38 H. 6. 18. and 39 H. 6. 5. it is said by the court, that this must be a seisin in fact; and that the ancestor must actually die seised, or else there cannot be an abatement. It would seem therefore necessarily to follow that in case of a writ of entry on abatement, a plea that he did not abate would put in issue the fact of the ancestor's dying seised, without which there could not be any such abatement. It may be added that in the writ of entry on intrusion, which very nearly resembles this writ on abatement, a plea "that he did not intrude," has been allowed (*m*). There is nothing indeed in that case to show the precise nature and extent of this plea; but it was pleaded in bar, and seems as if intended for a general issue.

(*l*) 3 Blacks. Com. 167. Co. Lit. 277. Plowd. 47.

(*m*) 22 E. 3. 16. Fitz. Double plea, 2.

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There are two other cases which seem to be opposed to the current of authorities above cited in this section. They are in 14 H. 6. 6. and 5 H. 7. 6; in the first of which it is said that no issue can be taken on an allegation of abatement, and that it is not a good traverse, to say that he did not intrude, or did not abate. The reason assigned is, that the issue would involve matter of law, which ought not to be submitted to a jury; but this seems quite unsatisfactory, as the objection would apply with equal force to the case of a disseisin (*n*). This point was not expressly decided in either case, and in the first there was no final judgment; and in each of them the reporter adds a *Quære*. If therefore they should be found irreconcilable with the others before cited, the authority of these two must undoubtedly yield.

The plea of the kind above proposed might be as follows:

7. Plea that he did not abate.

And the said T. comes and defends his right when, &c. and says that he the said T. (or, that the said F.) did not abate into the said tenements in manner and form as the said D. has above there-of complained against him; and of this he puts himself on the country.

If a plea in this form should not be thought sufficient to put in issue the seisin of the ancestor, and the unlawful entry on the part of the tenant, the only substitute must be in the one case to traverse specifically the seisin of the ancestor, and in the other to set forth in a special plea the title and right of entry of the supposed abator. This latter is the plea adopted in the case before cited from 2 H. Blacks. 444. The form of that plea does not appear to have attracted the notice, either of the bench or the bar; and even if it was irregular, it was only because it amounted to the general issue, and that defect could not be taken advantage of, unless on a special demurrer. If such a special plea is necessary, it must show distinctly the right of entry on which the tenant relies; and of course it may be as various as the estate which he

(*n*) See Stath. Intrusion, 4. cites 7 E. 3.

holds in the premises, and the title by which he claims it. It would therefore be needless to give forms of such pleas, each of which must be framed according to the peculiar circumstances of the case.

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If it should be thought necessary or proper to traverse the seisin of the ancestor, it might be done in the form following :

And the said T. comes and defends his right when, &c. and says that the said F. did not die seised of the said tenements with the appurtenances in his demesne as of fee in manner and form as the said D. has above thereof declared ; and of this he the said T. puts himself on the country (o).

8. Plea, that the ancestor did not die seised, &c.

Or, perhaps it might be as follows :

And the said T. comes and defends his right when, &c. and says that the said D. his action aforesaid thereof against him ought not to have and maintain, because he says that the said F. never had any thing in the tenements aforesaid with the appurtenances, unless as tenant thereof in dower (or, by the curtesy, or, for life) only, and this he is ready to verify : wherefore he prays judgment if the said D. his action aforesaid thereof against him ought to have and maintain, and for his costs (p).

9. Plea, that the ancestor had nothing, unless as tenant for life, &c.

And the said D. says that the said F. was seised of the said tenements with the appurtenances in his demesne as of fee, as the said D. has above in his declaration aforesaid alleged ; and this he prays may be inquired of by the country.

10. Replication, that F. was seised in fee.

The heirship of the demandant, if intended to be put in issue, must be specially traversed, in like manner as in the writ of entry on disseisin. Supra, Chap. IV. sect. 6.

(o) Rast. 28. 29.

(p) Rast. 28. Fitz. Issue, 15.



## CHAPTER VI.

## SECTION I.

*Writ of Entry on Intrusion.*

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THIS writ is founded on an entry by a stranger, after the death of a tenant in dower, tenant by the curtesy, or for life, and before the entry of him in remainder, or reversion. It lies also for the assignee of the remainderman, or reversioner, provided the assignment be made before the unlawful entry upon which the action is founded. After such an unlawful entry, the reversion or remainder is discontinued; and the reversioner or remainderman has only a right of entry, or of action, which cannot be assigned. But whilst he continues seised of the remainder or reversion, he may aliene it, as he may any other estate of which he is seised; and his assignee, after attornment, or any equivalent act, becomes actually seised of the reversion or remainder, as completely as the first holder was seised of it, and has the like remedies for any injury to his estate.

The entry on which this action is brought must be by a stranger; and made after the death of tenant for life. For if the tenant in the action enters during the life of the original tenant for life, and holds by or under him, the demandant has various other remedies more appropriate to his case. For example, if my tenant for life grants all his estate to A. B. and the grantee holds over after the death of his grantor, my proper remedy is the writ *ad Terminum qui prateriit*. So if the original demise was made to A. B. for the life of another, and A. B. holds over after the death of *cestuy que vie*, the remedy is the same. So if a tenant in dower, or by the curtesy,

grants all his estate, and the grantee holds over, the reversioner might probably maintain the writ of entry *ad communem legem*. The suggestion in the writ of the manner of the entry would be literally true; to wit, that he had "no entry but by one R. *who demised the same to him*." If tenant for life, or tenant in dower, or by the curtesy, alienes in fee, in tail, or for the life of another, the action, if brought after the death of such alienor, is a writ of entry *ad communem legem*. If such alienation be made by a tenant in dower, and the action is brought in her life time, as it may be by force of the statute of Gloucester, c. 7, it is a writ of entry *in casu proviso*. Upon a like alienation by a tenant by the curtesy, or a tenant for life, the action, if brought in the life time of the alienor, is a writ of entry *in consimili casu*.

In these latter cases it will be observed that the entry upon which the action is founded is not tortious. The party enters under a grant by the person then actually seised of the premises, and receives the possession from him. Whereas in the case of an intrusion, the possession is not voluntarily yielded by any person then lawfully seised; but the intruder enters upon the vacant possession, relying on some distinct claim, or pretence, of right in himself; and the writ of intrusion is framed with a view to contest that right (a).

If the intrusion is made after an estate for life, strictly so called, and if the demandant himself were the lessor, or grantor for life, the writ against the intruder may be as follows:

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. such a messuage, into which the said T. has no entry but by the intrusion (b) which he made thereinto after the death of one R. to whom he the said D. demised the same for the life of the said R. as it is said. And whereupon the said D. says that he himself was seised of the said messuage with the appurtenances in his demesne as of fee and right, taking the profits, &c. and being so thereof seised, demised the same to the

1. Intrusion,  
on the demise  
of demandant.

(a) Finch's L. 263-266.

(b) See F. N. B. 203. Fitz. Ab. Briefe, 808.

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said R. for the life of the said R. by force of which demise the said R. afterwards, within thirty years now last past was seised of the said messuage with the appurtenances in his demesne as of freehold for the term of his life, taking the profits, &c. and afterwards the said R. died : and into which the said T. has no entry but by the intrusion which he made thereinto as aforesaid.

If this action is to be considered as founded on the seisin of the demandant, that seisin must by our statute of limitations (1786, c. 13,) have been within thirty years. I apprehend however that it cannot be necessary to aver a taking of the profits by the lessor within that time ; because, if so, the action would not lie if the estate for life should happen to endure more than thirty years. By the making of the lease the grantor becomes seised of the reversion, and that seisin continues until the determination of the estate for life. The averment therefore of the existence of the estate for life within the thirty years seems to be a compliance with the provisions of the statute.

In the late case of *Widdowson v. Earl of Harrington*, 1 Jac. & Walk. 532, Sir Thomas Plumer, master of the Rolls, is said to have declared that in a writ of entry on intrusion brought by an heir, the fifty years limited in this behalf by the statute 32 Hen. 8. c. 2, must be reckoned from the actual seisin of the person who created the estate for life ; and upon the same principle the writ, if founded on a demise made by the demandant himself, would be limited to thirty years after that demise. The consequence would be, that if the tenant for life should live more than thirty years, the original lessor would be barred by the statute ; and if he should live more than fifty years, the heir of the lessor would be barred in like manner. It is true that in both cases there would be a right of entry in the reversioner, or his heir ; but if that right were in any manner tolled, the party would be without remedy. This construction seems to be inconsistent with the general scope of the statute, which is to require every claimant to pursue his remedy within certain periods after his right is invaded. The *words* of the statute also would perhaps be fully satisfied, by referring

them to the seisin of *the reversion* in the demandant or his ancestor, as above suggested, instead of an actual *seisin of the land*. Indeed there are many writs of entry on intrusion in which the demandant does not state, and is not required to state, a seisin of the land, either in himself, or in his ancestor, or predecessor. Such are all the writs brought by remainder-men, and by assignees of the reversion. These latter cases therefore are not included in the statute, and are subject to no limitation whatever, unless the seisin of the reversion which is set forth in the writ is considered as the seisin upon which the writ is brought. Indeed in this very case of *Widdowson v. Earl of Harrington*, the plaintiff claimed as heir of a remainder-man, and not as heir of a reversioner, and therefore never could have proved a seisin of the land, either in himself or in any ancestor; and although this circumstance is pointed out by the counsel on the second argument, yet the master of the Rolls is made to repeat the proposition that the demandant ought to count on the seisin of his ancestor by taking the esplees within fifty years. This, and some other opinions (c), attributed to the master of the Rolls in that case, seem to prove either that he was misunderstood by the reporter, or that he had not sufficiently examined the subject; and must detract not a little from the authority of that decision. Its authority seems also to be much shaken, if not expressly contradicted, by Chief Justice Gibbs, in the case of *Romilly v. James*, reported in 6 Taunt. 263, and in 1 Marsh. 592. 599.

If however it should be determined that there must have been a seisin of the land by the demandant or his ancestor, within the period of limitation, the clause, "within thirty years now last past," may be struck out from the place where it now stands in the above form, and inserted in the averment of the demandant's seisin.

(c) See particularly pa. 548, where he is remarking that the statute 21 James 1. c. 16, takes away the right of entry, and then adds, "and if so, it takes away the writs of entry also; and these possessory remedies, without reference to the particular form of action, are barred if the party does not enter within twenty years."

CHAP. VI.	If the demise were made by the father of the demandant, the writ and count may be as follows :
2. — on demise by demandant's father.	<p>—in a plea of land, wherein the said D. demands, &amp;c. which he claims as his right and inheritance, and into which the said T. hath no entry but by the intrusion which he made thereinto after the death of one R. to whom one F. the father of the said D. whose heir he is demised the same for the life of the said R. as it is said. And whereupon the said D. says that the said F. in his life time was seized, &amp;c. in his demesne as of fee and right, taking the profits, &amp;c. and being so thereof seized demised the same to the said R. for the life of the said R. by force of which said demise the said R. afterwards, within thirty years now last past was seized of the said tenements with the appurtenances in his demesne as of freehold, taking the profits, &amp;c. and afterwards the said R. died : and from the said F. the right to the reversion of and in the tenements aforesaid with the appurtenances descended to the said D. who now demands the same as the only child and heir of the said F. and into which, &amp;c.</p>

Writs of entry on the seisin of an ancestor have now, by the statute 1807, c. 75, the same limitation as those on the demandant's own seisin. The seisin of the tenant for life is therefore in this case also alleged to be within thirty years.

When the demise is made by a more remote ancestor, the writ on intrusion will be readily framed, by reference to the preceding form, and to those on disseisin *cum titulo*, supra, Chap. II.

Although it is well settled that the writ of intrusion lies for a remainder-man, as well as for a reversioner (*d*), yet I have found no precedent of a count for such a case. There is in the Register, 234. b. and in Fitz. N. B. 204, an example of a writ for the heir of him in remainder ; and there is also in the Register, 235, a writ setting forth an assignment of the reversion, after an estate for life, to H. in tail, with remainder to I. in fee ; and the writ is brought by I.

The form for a remainder-man may be as follows :

(*d*) Finch. L. 66. F. N. B. 204.

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—in a plea of land wherein he demands, &c. into which the said T. has no entry but by the intrusion which he made thereinto after the death of one R. who held the same for his life, the remainder thereof belonging to the said D. the now demandant, by force of a demise which one A. B. thereof made to the said R. for his life and after his death to the said D. and his heirs and assigns forever, as it is said. And whereupon the said D. says that the said A. B. was seised, &c. taking the profits, &c. and being so thereof seised, demised the same to the said R. for the life of the said R. and after his death to the said D. and his heirs and assigns forever; by force of which demise the said R. afterwards, within thirty years now last past, was seised of the said tenements with the appurtenances in his demesne as of freehold, taking the profits, &c. and he the said D. was seised as of fee of and in the said remainder thereof expectant on the death of the said R. and afterwards the said R. died: and into which, &c.

3. — for a remainder-man.

The demandant in this case cannot allege any seisin in himself, by taking the profits; nor does he count on the seisin of an ancestor. It is therefore manifest, as mentioned above, that his seisin of the remainder is sufficient to maintain the action; and that seisin is shown, as in the former case, to have been within thirty years, by averring the seisin of the tenant for life within that time.

The form for the heir of a remainder-man will vary as usual. It will contain the clause, “which he claims as his right and inheritance,” and proceed as follows:

—and into which the said T. hath no entry but by the intrusion which he made thereinto after the death of one R. who held the same for his life, the remainder thereof belonging to one F. the father of the said D. whose heir he is, by force of a demise, &c. to the said R. for his life, and after his death to the said F. and his heirs and assigns forever, as it is said. And whereupon, &c. and afterwards the said R. died; and from the said F. the right to the said remainder of and in the said tenements with the appurtenances descended to the said D. who now demands the same as the only child and heir of the said F. and into which, &c.

4. — for the heir of a remainder-man.

Upon an intrusion after the death of a tenant in dower, the writ and count may be as follows:

—after the death of one R., who was the wife of one F. and who held the same for her life as tenant thereof in dower of the

5. — after the death of tenant in dower.

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endowment of the said F., formerly her husband, the father (or other ancestor) of the said D., whose heir he is, as it is said. And whereupon the said D. says that the said F. in his life time was seised, &c. taking the profits, &c. and afterwards died so seised thereof; after whose death the said R., who was the wife of the said F., held the same for her life as tenant thereof in dower of the endowment of her said late husband, and was thereof seised accordingly in her demesne as of freehold within thirty years now last past, taking the profits, &c. and afterwards the said R. died; and from the said F. the reversion of the tenements aforesaid with the appurtenances descended to the said D., who now demands the same as his only child and heir; and into which, &c.

In this case it is said, that *the reversion* descended to the demandant instead of *the right of the reversion*, as it is in some of the preceding forms. The latter mode of expression is generally adopted in stating a descent in real actions, when the discontinuance or ouster complained of occurred in the time of the ancestor, so that a mere right descended to the heir; and even though in any of the preceding cases the intrusion should have been made after the seisin of the reversion by the present demandant, it does not appear that the tenant could take any advantage of that circumstance. But in the case of a tenancy in dower, the reversion never was in the ancestor, and of course he could not have been ousted of it. If the action is brought by a more remote heir of the husband, to whom the reversion has descended from an intermediate heir, it may be well, in stating the descent from the first heir, to say, as in the other cases, that the right to the reversion descended from him to the second heir. In a form proposed by Booth (e), which is the only count that I have seen in this action, it is said that the *reversion* descended from the husband to the heir.

If the widow had recovered her dower in an action against the heir of the husband, it was thought proper in the English practice to mention that circumstance in the writ of intrusion. If this should be judged necessary here, the form might be varied as follows:

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—after the death of one R. who was the wife of one F. and who recovered the same against the said D. (or, against one G. the father of the said D., whose heir he is) by the consideration of our Justices of our Court of —, begun and held, &c. as her dower of the endowment of the said F., formerly her husband, the father (*grandfather, or other ancestor*) of the said D., whose heir he is, as it is said. And whereupon, &c. the said F. was seised, &c. after whose death the said R. by the consideration of our Justices, &c. recovered the same against the said D. as her dower of the endowment of the said F., formerly her husband, the father of the said D., whose heir he is; by force whereof the said R. was accordingly seised of the said tenements, &c. and from the said F. the reversion of the said tenements, &c. descended to the said D., who now demands the same as the only child and heir of the said F., and afterwards the said R. died: and into which, &c.

6. —the like, when the widow had recovered her dower by judgment.

The manner of stating the recovery in the above form corresponds with the recital of the judgment in the writ of *Habere facias seisinam*, which is prescribed by our statute, upon a recovery in a writ of dower (*f*).

If the intrusion took place after the death of a tenant by the curtesy, the count may be as follows:

—after the death of one R., who held the same as tenant thereof by the curtesy after the death of one M., formerly his wife, and the mother of the said D., whose heir he is; as it is said. And whereupon the said D. says that the said R. and M. his wife were seised of the tenements aforesaid with the appurtenances in their demesne as of fee, in right of the said M., taking the profits, &c. and afterwards the said M. being so seised thereof with her said husband, died; after whose death the said R. held the same for his life, as tenant thereof by the curtesy, and was thereof seised accordingly in his demesne as of freehold within thirty years, &c. taking the profits, &c. and afterwards, the said R. died; and from the said M. the reversion of the tenements aforesaid with the appurtenances descended to the said D., who now demands the same as her only child and heir: and into which, &c.

7. — after the death of a tenant by the curtesy.

Of this count also I have found but one precedent, and that likewise is a form composed by Booth (*g*). In this case, and also in intrusion after the death of tenant in

(*f*) Stat. 1783, c. 41.

(*g*) 182.



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dower, the demandant should insert the clause, "which he claims as his right and inheritance."

In all the preceding writs of intrusion the demandant is the original remainder-man, or reversioner, or the heir of him in remainder or reversion. When the action is brought by an assignee, the form may be varied as follows:

8. — by assignee of reversioner.

—after the death of one R. who held the same of the said D. for the life of him the said R. by force of an assignment which one A., who demised the same to the said R. for the same term, thereof made to the said D. and his heirs and assigns forever; as it is said. And whereupon, &c. the said A. was seised, &c. and being so thereof seised, demised the same to the said R. for the life of the said R., by force of which demise the said R. within thirty years now last past was seised, &c. taking the profits, &c.; and afterwards, to wit, on the — day of —, at —, the said A. being seised of the reversion of and in the said tenements with the appurtenances expectant on the death of the said R., did by his deed of that date duly signed, sealed, acknowledged and registered, for a valuable consideration therein expressed, grant and assign to the said D. and his heirs and assigns forever the said reversion expectant as aforesaid [or, the tenements aforesaid with the appurtenances] by force whereof he the said D. was seised as of fee of the said reversion of and in the tenements aforesaid with the appurtenances expectant on the death of the said R., and afterwards the said R. died; and into which, &c.

In this count it is said that the tenant for life held the premises *of the demandant*; and if the action is brought by the heir of the assignee he will say that the tenant for life held of the demandant's ancestor. It is so stated in the only count of this kind which I have found (*h*); and in all the writs of this description in the Register, (*i*) and in Fitz. N. B. (*k*). This shows what was before observed, that the assignment must be made during the continuance of the estate for life. Such an assignment was not effectual at the common law without

(*h*) Rast. Ent. 416.

(*i*) 233.

(*k*) 203. See also Bro. Ingressu ad com. legem, 4. 38 H. 6. 30.

the attornment of the tenant for life, by which he consented to hold of the assignee, and became his tenant; and the attornment was therefore always averred in ancient times in stating such an assignment. An attornment not being required by our laws, that averment is omitted in the preceding form.

In the above mentioned precedent in *Rastel*, 416, the assignment was by fine; and it is stated as a conveyance of the land itself. In *Coke's Entries*, 341. an assignment of a reversion after an estate-tail is set forth in a count in *Formedon in reverter*; and there also the assignment, or conveyance, is said to be of the tenements, and not, of the reversion. In that case the assignment is by a covenant to stand seised, by the heir of the donor to whom the reversion had descended; and it is averred that by force thereof, and of the statute for transferring uses into possession, the assignee was seised of the reversion. There seems to be no objection in our practice to stating the assignment, according to the simple truth of the fact, to be of the reversion; but if the other form is thought preferable, the pleader will adopt the expression above inclosed in brackets.

In setting forth a demise of any kind in the count in real actions, it is not generally necessary to state it to have been by deed, because at the common law such conveyances might usually be made without deed; and the statute of frauds, which requires an instrument in writing, has not altered the form of pleading. But a reversion, which lies in grant and not in livery, could never have been assigned by parol; it was therefore deemed necessary in pleading such an assignment to aver it to have been made by deed, or by fine, &c. There is a case in *Mich. 2. Ed. 3. pl. 5.* of intrusion after the death of a tenant in dower, brought by the assignee of the reversion, in which exception was taken to the count for want of showing that the assignment was by deed; and the court appeared to consider the objection as fatal.

From the preceding form, and a reference to the writs in the Register and in *F. N. B.* it will be easy to frame a count for an assignee of the reversion after the death

CHAP. of a tenant in dower, or by the curtesy ; and also for the  
VI. assignee of an assignee.

In all the preceding cases the wrongful entry is supposed to have been made by the present tenant. If the writ is in the *per*, it will vary as follows :

9. — in the *per*. —into which he has no entry but by one S. who demised the same to him, and who unjustly intruded himself into the same after the death of one R., &c.

In the *per and cui* :

10. — in the *per and cui*. —no entry but by one P. to whom one S. demised the same ; which said S. unjustly intruded himself, &c.

In the *post* :

11. — in the *post*. —no entry but after the intrusion which one S. made thereinto after the death of one R. to whom the said D. demised the same for the life of the said R. (*or*, who held the same for her life as tenant thereof in dower, &c.) and which after the death of the said R. ought to revert (*or*, remain, *as the case may be*) to the said D. as it is said. And whereupon, &c. and into which the said T. has no entry but after the intrusion which the said S. made thereinto as aforesaid ; and whereof the said D. complains that the said T. unjustly deforces him.

If the writ in the *post* be brought by an assignee, he will say,

12. — in the *post* by an assignee. —and which after the death of the said R. ought to revert (*or*, remain) to the said D. by the form of the assignment aforesaid, as it is said, &c.

This clause, *et quæ post mortem, &c. reverti debet*, *or, remanere debet*, is found in every writ on intrusion in the *post*, in the Register, and in F. N. B. ; but I do not find it at the close of the *count*, except in one precedent in Rast. 416. pl. 5.

In the forms of counts on intrusion in Booth, it is said that the tenant for life died seised ; but this averment is not found in the precedents in Rastel, and I have omitted it in all the above forms. The insertion of it, when the

fact is so, would not vitiate the count; but by omitting it, the same count will serve without any alteration, when the present tenant, or the party under whom he claims, originally disseised the tenant for life and holds over after his death, in case it should be determined that the writ on intrusion would lie in that case. It is true that in the common description of an intrusion, it is said to be an entry by a stranger after the determination of an estate for life, and before the entry of him in remainder or reversion; and it may therefore be doubted whether the writ of intrusion will lie upon an entry made during the continuance of the estate for life. But this description seems to have been made with reference chiefly to the remedy for such an ouster; as to which it is certain that the remainder-man or reversioner cannot maintain the action during the life of the tenant for life. As long as the particular estate endures, it is of no importance to him in remainder or reversion, whether the tenant for life, or some stranger, has possession of the land and receives the profits; inasmuch as the remainder-man or reversioner is not entitled to them. His right of entry first accrues upon the determination of the estate for life. As he may at that time enter upon the intruder and oust him without any action, it seems that he might with equal justice consider the intruder as having then first entered, and might bring his writ of intrusion accordingly; and it may well be doubted whether the tenant in such an action could qualify his own wrong, and say that his present possession was only a continuation of that which he had before wrongfully acquired from another person. By his disseisin of the tenant for life he has to some purposes acquired an estate in fee-simple; but if he should profess to hold only for the life of the tenant for life, and if upon the determination of that estate he should quit the possession, or yield it to him in remainder or reversion, the latter could never maintain any action, nor would he have any cause of complaint, against the supposed disseisor. It seems therefore that the whole injury of which the reversioner or remainder-man can complain, is the actual seisin of the stranger after the death of the tenant for

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life. This is *the intrusion*, by which he is ousted, and upon which his action is founded; and this injury to him is not diminished nor altered by another injury which the same party had before committed to another person.

It may be added, that if the action can be maintained upon the principles above suggested, the person actually in possession at the determination of the particular estate will be considered as the original intruder; and not as having entered by, or under, any one who had previously disseised the tenant for life.

There are in the Register two precedents of writs on the case here supposed, of a disseisin of tenant for life, which do not seem to accord with each other, nor with the opinion which I have ventured to suggest. They are both found in page 230, among writs of entry on disseisin. In the first it is said that "the said T. has no entry but by B. who demised it to him, and who thereof unjustly, &c. disseised C. who held it for his life of the grant which E. thereof made by fine, &c. and which after the death of the said C. ought to remain to the said D. as the son and heir of the said E. by the form of the fine aforesaid," &c. There seems to be some misprint in the book, confounding the names of the parties. It is said that it ought to remain to the demandant as the son and heir of C., instead of E., who is the grantor. But if we are to suppose it correctly printed, and that the land was given to C. for life, with remainder to his heirs, and if we suppose also that by the law as then understood C. would hold only for life, and that his heir would take as a remainder-man; the case would still be substantially the same as to the point for which we are now considering it. In the other writ, which is brought by a bishop, it is said that "the said T. has no entry but after the demise which one I. thereof made to one S. for the life of the said S. who held the same for his life of one R. formerly bishop of, &c. predecessor of the said now bishop, (the demandant) of the assignment which the said I., who demised it to the said S. for the term aforesaid, thereof made to the said (former) bishop, and which after the death of the said S. ought to revert

to the said (now) bishop," &c. In the *regula*, immediately following this writ, it is said that it lies "when the tenant for term of life is disseised, and dies in that state, (i. e. disseised) and the reversion is granted to another." If so, the writ in the former case might have been in this form, as the two cases are substantially alike. This last writ is not a writ of entry on disseisin, and indeed is not precisely like any of the writs of entry; although it resembles very nearly the writ *ad terminum qui præterit* in the *post*. The other precedent also resembles the writ *ad terminum qui præterit* in the *post*, as much as it does any writ on disseisin; though it is not precisely like any other precedent that I have found, of either kind. If it should be thought that the common writ on intrusion would not lie when the particular tenant had been disseised, a writ and count may be framed for such a case like either of the two last mentioned precedents.

This action may be maintained by one who has the remainder or reversion for life; but not by the heir in tail (*l*). A tenant for life cannot rightfully grant for the life of another; of course he cannot count on an original demise by himself: but if the limitation in the original conveyance were to A. for life, remainder to D. for life; D. may have this action upon an intrusion after the death of A. So if he who has the reversion or remainder after an estate for life, in dower, or by the curtesy, lawfully assigns it to D. for life. So if the husband had conveyed to D. for life, and afterwards his widow recovers her dower against D., if a stranger intrudes after the death of the widow, D. may maintain this action. A conveyance by a tenant in tail for the life of another would not bind the heir in tail; but such a grant would be good so long as the grantor lived; and if within that time the grantee for life dies, and a stranger intrudes, it seems that the tenant in tail may maintain this action. Having been once seised by force of the entail, he could not have a writ of Formedon (*m*). But if in such a case the grantee for life should survive the grantor, the

(*l*) F. N. B. 204.(*m*) F. N. B. 219. 212.

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estate tail would be discontinued, and the heir in tail could not of course count on his own seisin. He must count on the seisin of his ancestor; and that he cannot do in any action excepting a Formedon.

## SECTION II.

*Pleas in writs of entry on Intrusion.*

The pleas in abatement in this action are substantially the same as in the two preceding actions. Those pleas in bar also, which are common to all these actions, may be framed by reference to the precedents in Chapter IV.

If the plea, "that he did not abate," should be considered as the general issue in the writ on abatement, it is probable that for the same reasons, as well as from the precedent before cited from 22 E. 3. 16. (n) that the plea, "that he did not intrude," would be allowed as the general issue in this action; that is, as putting in issue all the material allegations in the count, respecting the title to the land. This of course would not include the heirship of the demandant, when the action is brought on the title of an ancestor; but merely the questions, whether there was such a reversion or remainder as alleged in the count; and if there was, whether the person who is said to have intruded had not a right of entry under an elder and better title (o).

Such a plea would be as follows:

13. Plea, that he did not intrude.

And the said T. comes and defends his right when, &c. and says that he the said T. (or, that the said F.) did not intrude into the tenements aforesaid in manner and form as the said D. has above thereof complained against him; and of this he puts himself on the country.

It is remarkable, that although there are several counts on intrusion in Rastel's Entries, there is not one plea in bar of any kind; and in Coke's Entries there is no count nor plea in this action.

(n) See also Stath. Ab. Intrusion, 4. and Yelv. 170.

(o) See Bro. Traverse, 178. 3 H. 7. 7. 22 H. 6. 43.

We find in the Year Books a few pleas in bar; most of which are unnecessary, if the plea of *non intrusit* puts in issue the remainder or reversion set forth in the count, as well as the wrongful entry on the part of the tenant. In 43 E. 3. 19 (*p*), which was a writ of intrusion founded on a demise by B. the demandant's ancestor, the tenant pleaded that B. never had any thing in the premises. It was objected that this plea was bad; and that he ought to have said that B. did not demise; but the plea was held good. The demandant then replied, that B. was seised, and tendered an issue. It was objected that he ought to reply, that B. was seised, *and demised*; and the court was of that opinion, and ordered the replication to be so entered; the Judge adding, "but perhaps nothing shall be inquired of, except the demise."

This plea ought perhaps to have been adjudged bad, as being argumentative (*q*); but the opinion of the court, whether right or wrong in that particular, seems to show that a traverse of the demise would have been thought good. In 24 E. 4. 74, on a writ of intrusion on a demise made by the ancestor of the demandant to W., the tenant pleaded that in the life of W. he, the tenant, was seised in fee, and gave in tail to the said W. whose estate continued until he died without issue, and the tenant entered, without this that W. at his death had any thing in the tenements by the demise of the demandant's ancestor. This plea was objected to, because it did not directly traverse the demise, nor the descent of the reversion to the demandant, nor the intrusion; but it was held good. There is another writ of the same kind in 43 E. 3. 5. on a demise by the demandant to one B. for his life. The tenant pleaded that the said B. was seised in fee on the day of his death; and that R. his son, entered and enfeoffed the tenant, to which the demandant replied that B. had only an estate for life. The court doubted whether this was a proper issue; but as the demandant had accepted it, they suffered it to be entered. The plea in 46 E. 3. 18. is merely a denial that the demandant is

(*p*) Fitz. Intrusion, 2. and see Stath. Intrusion, 1.

(*q*) See Dyer, 122. pl. 23.



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the heir of the person who was seised of the reversion; which undoubtedly ought always to be specially pleaded (*r*). The three first of these cases seem to amount merely to a traverse of the demise set forth in the count; or in other words, to deny the existence of the reversion or remainder on which the action is founded. If there was no such reversion or remainder, there could not have been such an intrusion; and it would seem therefore that this question would be necessarily involved in the general plea of *non intrusit*.

It does not appear in any of these cases that the plea was objected to, as amounting to the general issue; and as they are clearly good in substance, they may have passed without observation of this defect in form, if it be a defect. Another circumstance may have led to some inattention, or mistake on this subject. In all the numerous writs of entry which are, properly speaking, founded on a demise stated in the writ, that demise is traversable; and it must be expressly traversed, if the tenant intends to put it in issue. The reason is, that in those actions there is no allegation of a tortious entry by the tenant, or the person under whom he holds; and of course no general plea that can put in issue the lawfulness of the entry; but the entry is said to have been by force of a demise from some one, who wanted capacity, or legal authority, to make such a demise, or whose conveyance was for some cause defeasible. As the writ of intrusion sometimes contains an allegation of a demise, (to wit, whenever it sets forth a lease for life) and as that was a material averment in the count, it was not unnatural that pleaders, when intending to put this fact in issue, should adopt the form which had been used in the other actions.

If it should be thought necessary to deny the demise specially, when it is intended to put it in issue, the plea may be readily framed by reference to the cases above cited in this section, and to the pleas of the like nature, in the two succeeding chapters.

(*r*) See the four cases last cited in Fitz. Intrusion, 1. 2. Bro. Intrusion, 2. 3. 5. 11.

## CHAPTER VII.

## SECTION I.

*Writ of Entry ad Communem Legem.*

WHEN a tenant in dower, or a tenant by the curtesy, or for life, aliened in fee, in tail, or for the life of another, this produced a forfeiture of the estate of such alienor, and he in the reversion or remainder might immediately enter, and avoid the estate of the grantee. But if the right of entry of the reversioner or remainder-man were in any manner lost, they had no remedy whatever at the common law during the life of such alienor; and after his death the appropriate remedy was this writ *ad communem legem* (a).

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This was so called in contradistinction to the writs *in casu proviso*, and *in consimili casu*; the latter writs being given by statute, and being maintainable after such an alienation, even during the life of the alienor. There seems to be no reason why this action should not lie also in some cases after a grant for the life of the grantor, when the grantee holds over after the death of the grantor (b).

When the alienation has been made by a tenant for life, to whom the demandant had demised the premises, the writ and count may be as follows:

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. a certain messuage, &c. into which the said T. has no entry but by one R. who demised the same to him, to which said R. the said D. demised the same for the life of the said R. as it is said. And whereupon the said D. says that he

1. On alienation by tenant for life.

(a) 2 Inst. 309.

(b) See Supra, Ch. VI. § 1.

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himself was seised of the said messuage with the appurtenances in his demesne as of fee and right taking the profits, &c. and being so thereof seised, demised the same to the said R. for the life of the said R. by force of which demise the said R. afterwards within thirty years now last past was seised of the said messuage with the appurtenances in his demesne as of freehold, taking the profits, &c. and afterwards the said R. died; and into which the said T. has no entry but by the said R. who demised the same to him as aforesaid.

The same remarks which were made above, Chap. VI. § 1, as to the period of limitation for writs on intrusion, apply equally to this writ; and if the seisin of the lessor in the preceding case must be alleged to have been within thirty years, the clause relating to that point must be transposed accordingly.

When the demandant himself made the grant to the tenant for life who aliened, he may omit the clause, "which he claims as his right and inheritance (c);" but if the action is brought by an heir of the lessor, that clause must be inserted, and the count will be varied in other respects, as usual.

Upon an alienation by a tenant in dower, the form may be as follows:

2. On alienation by tenant in dower, in the *per* and *cur.*

—which he claims as his right and inheritance, and into which the said T. has no entry but by one S. to whom one R. demised the same, which said R. held the same for her life as tenant thereof in dower of the endowment of one F. formerly her husband, the father of the said D. whose heir he is, as it is said. And whereupon the said D. says that the said F. was seised of the said demanded premises taking the profits, &c. and afterwards died so seised thereof; after whose death the said R. who was the wife of the said F. held the same for her life as tenant thereof in dower of the endowment of her said late husband, and was thereof seised accordingly in her demesne as of freehold within thirty years now last past, taking the profits, &c. and afterwards the said R. died; and from the said F. the reversion of the tenements aforesaid with the appurtenances descended to the said D. who now demands the same as his only child and heir; and into which the said T. has no entry but by the said S. to whom the said R. demised the same as aforesaid.

Upon an alienation by a tenant by the curtesy, it may be as follows :

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—which he claims as his right and inheritance, and into which the said T. has no entry but after the demise which one R. thereof made to one S. which said R. held the same as tenant thereof by the curtesy after the death of one A. formerly his wife, the aunt of the said D. whose heir he is ; and which after the death of the said R. ought to revert to the said D. ; as it is said. And whereupon the said D. says that the said R. and A. his wife, &c. (*stating the seisin of the husband and wife, the death of the wife, and the subsequent seisin of the husband and his death ; as in the writ on intrusion, sup. Chap. VI. pl. 7.*) and from the said A. for that she died without issue, (*or, without any heir of her body issuing*) the reversion of the tenements aforesaid with the appurtenances descended to one F. as the brother and heir of the said A. and from the said F. the reversion aforesaid (*or, the right of the reversion aforesaid*) descended to the said D. who now demands the same as the only child and heir of the said F. and into which said messuage the said T. has no entry but after the said demise thereof made by the said R. to the said S. as aforesaid ; and whereof the said D. complains that the said T. unjustly deforces him.

3. On alienation by tenant by the curtesy, in the post.

The writs *ad communem legem* very nearly resemble those on intrusion, differing only in the manner of stating the entry by the tenant. I have therefore thought it unnecessary to propose any more than these three forms ; of which the two first are within the degrees, and the third is in the post.

This action being founded on a demise, that is to say, the original entry, under which the tenant is supposed to hold, being made by force of a conveyance by a person then lawfully seised, the first entry is said to be *by (per)* the grantor ; and of consequence one of the degrees is lost, as mentioned above in the first chapter (*d*). The true reason why the common law prohibited a writ of entry when the degrees were past was, not because there had been more than *three* tenants holding under the defective title, but because there had been more than *two* alienations or descents under that title (*e*) ; and in the

(d) *Supra*, 7.

(e) See 2 Inst. 153.

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preceding writ in the *per* and *cui* there are two such alienations, although there had been only two tenants.

This action also lies for the assignee of the reversion or remainder (*f*). A writ and count for such a case may be readily framed by reference to the writ on intrusion by an assignee; *supra*, Chap. VI. pl. 8.

In the case of an alienation by a tenant for life strictly so called, it is said in F. N. B. 208, that the demandant may after the death of the tenant for life have either this writ, or a writ *ad terminum qui præterit*, at his option (*g*). But this seems to be the more appropriate action; the writ *ad terminum qui præterit* being provided for the case of a holding over by the original lessee, or by one to whom he had conveyed only his own estate, which he might rightfully convey.

The clause, *et quæ post mortem, &c. reverti debet*, in this action, as in that on intrusion, is inserted when the writ is in the *post*. When it is within the degrees, the death of the tenant for life is mentioned only in the count (*h*).

This action, like that on Intrusion, may be maintained by him who has the remainder or reversion for life; but not by one who claims as heir in tail, for the reason given above as to the writ of Intrusion (*i*).

## SECTION II.

### *Pleas in writs of Entry ad Communem legem.*

I have not found any precedent of a plea in this action in any of the books of Entries, nor in any of the cases collected by Ashe (*k*). There are two cases there cited, from Fitz. Briefe, 661, and 794, in each of which an objection was taken to the writ for a fault apparent on the face of it; but this of course did not require a plea

(*f*) Reg. 235. F. N. B. 208. Bro. Ingressu ad com. legem, 4. 38 H. 6. 30.

(*g*) See also Fitz. Briefe, 794. (*h*) 2 Inst. 310.

(*i*) Ch. VI. § 1. (*k*) Tit. Entry, et Briefe d'entry, 43, and seqq.

in abatement, and the defects seem to have been pointed out on demurrer, or perhaps on a mere motion. In the case in 33 H. 6. 38, on a counterplea of receipt which was much debated, it is stated repeatedly in argument, and not denied by any one, that in the writ of entry *ad communem legem*, the demise (that is, the supposed lease or grant, by the demandant or his ancestor to the tenant for life,) is material and traversable. This is said to be "the point of the writ," and the plea by which it is traversed is evidently considered as the general issue. The action is founded on the demandant's right to the reversion; and when the estate for life is stated to have been by demise, if the tenant can show that there was no such demise, it follows that there could not have been such a reversion. As in Formedon, the plea of *non dedit* is always a good answer; because if there was no such gift, there could not have been such an estate as the demandant claims, whether it be in Descender, Remainder, or Reversion.

This traverse of the demise is not to be understood literally, as merely denying that the supposed grantor made such a deed as is alleged; but it puts in issue also the effect and operation of the instrument, if such a one were made. Suppose for example that my tenant for life or years should make a conveyance in fee; if this conveyance were afterwards stated in any action against me, I might plead that he did not grant or demise, and under that plea show that he held only for life or years, and therefore could not grant the inheritance. This plea, like that of *non dedit* in Formedon, puts in issue the title of the supposed grantor, as well as the conveyance by him (1).

If the particular tenant, in this writ *ad communem legem*, were seised as tenant in dower, or by the curtesy, there is no demise alleged on the part of the demandant; and then the mode of denying the reversion would be to say, that the demandant, (or his ancestor, as the case may be) never had any thing in the premises, or, was never seised in fee.

(1) See Fitz. Issue, 36. Dyer, 122. pl. 23.

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There is another demise alleged in this writ, which is of a very different description from that above mentioned. It is the demise made by the tenant for life, and under which the tenant in the action is supposed to hold. This is not material to the title of the demandant, and only shows the manner of the tenant's entry; and if it is misstated, the tenant should plead it as a mistake of the entry. These two demises however, and the pleas applicable to them, bear so much resemblance to each other, that they seem to have been sometimes confounded. The reader who wishes to examine this subject, will find the ancient cases collected in Thel. Dig. Lib. 11. c. 52, and 54 (*m*). The difference between the two pleas is clearly stated in 17 E. 3. 69; where it is said, that in every writ of entry in which a demise is alleged, if the demise is the cause or foundation of the action, it ought to be traversed or admitted; and if it is traversed, the plea is in bar of the action: but if the demise only makes a degree, and is not the cause or foundation of the action, then a traverse of the demise is a plea to the writ, showing a mistake of the entry (*n*). The demise by one, *dum non fuit compos mentis suæ*, in the writ of that name, is mentioned as an example of the first kind of demise; and that by a disseisor, in a writ of entry on disseisin in the *per*, as an example of the other kind.

We find accordingly sundry precedents of such pleas in bar, in the writs which are founded on a demise; as in the writ *ad terminum qui præterit* (*o*); the writ *dum non fuit compos mentis* (*p*); and the writ *sur cui in vita* (*q*); to which we may add the writ *sine assensu capituli* (*r*). In this last case the plea is, that the Abbot did not demise to the said E. *without the assent of his chapter*, &c.; but the latter words are undoubtedly inserted by mistake; and the plea was intended as a gen-

(*m*) See also 2 Inst. 346.

(*n*) Thel. Dig. L. 11. c. 54. § 32. Fitz. Cui in vita, 12. Entre, 71, 72. Briefe, 817. 820. 6 E. 3. 244. (pl. 3.)

(*o*) Rast. 25. Herne's Plead. 388. (484.) F. N. B. 202.

(*p*) Rast. 250. (*q*) Co. Ent. 642. (*r*) Rast. 593.

eral traverse of the demise. If it was intended to say, that he *did* demise *with* the assent of his chapter, it would have been proper to set forth the conveyance or demise specially ; or to allege that he did demise with their assent ; or, that he did not demise in manner and form as, &c. ; but if it was intended, that he did not demise at all, the latter part of the plea is wholly unnecessary, if not worse than useless (s). In the four last mentioned actions the tenant is supposed in the writ to hold, mediately or immediately, under the demise set forth in the writ, that is, under the person to whom that original demise was made ; and the demandant undertakes to show that the estate created by that demise is now determined, or that the conveyance was originally defective, so that the tenant in either case cannot now justly hold under that demise. But if there never was any such demise, this question cannot arise ; and the demandant has no title which can be tried under the writ which he has brought. If he has any other kind of title to the land, he must assert it in another form of action.

When the demise is traversed in a plea in bar, the form of the plea varies according to the different circumstances of the case. In the precedent above cited from Rast. 250, of a plea in the action *dum non fuit compos mentis*, the tenant sets forth, by way of inducement, his title and the manner of his entry, and traverses the supposed demise, concluding with a verification : and the plea in 18 E. 3. 41, is in the same form. In all the other precedents above cited from the books of entries, there is a simple denial of the demise, with a conclusion to the country. The occasion of this difference undoubtedly is, that in the two cases where there is a formal traverse, with a verification, the demise in the writ is alleged to have been made to the tenant himself ; and in all the others the demise is to some other person, and the writ is in the *post*. In the latter cases the plea does not falsify the tenant's entry ; for it is not alleged that he entered *by* any one. But in the two first mentioned

(s) See *Infra*, Chap. XI. § 2.



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cases, whilst denying the demise supposed to be made to himself, (and which is the foundation of the writ) he is also falsifying the entry; for if the insane person did not demise to him, it follows that he did not enter *by* that person. As it is an established rule, with respect to a mistake of the entry *when pleaded to the writ*, that the tenant shall never plead such a mistake without showing by whom, or how, he did enter; the same rule seems to have been extended (perhaps unnecessarily) to pleas in bar, which traverse the demise, when the mistake of the demise happens to involve a mistake of the entry (*t*). In other words, the rule as thus applied is, that the tenant cannot plead *in abatement* a mistake of the entry, when the facts show such a mistake of the demise as is *a bar to the action*; but he must plead it in bar.

In this writ *ad communem legem*, the first demise, that is, the lease by the demandant or his ancestor to the tenant for life, (when such a demise is stated) is the cause or foundation of the action, or of the demandant's title, and if this is traversed, it must be by a plea in bar; and it is then the general issue. But the supposed demise by the tenant for life does not create the demandant's right of action, but only affects the form of it; for if there was such an estate for life, and it is now determined, the reversioner is entitled to the possession, whether the present tenant entered under the former tenant for life, or in any other manner. If therefore he did not enter under that former tenant for life, that is, if the latter did not demise to him, he ought, when traversing that demise, to show how he did enter, so as to give the demandant a better writ; in which case his plea would be in abatement of the writ, and not in bar of the action.

The general issue, traversing the demise to the tenant for life, may be as follows:

4. Plea, *non  
dimisit.*

And the said T. comes and defends his right when, &c. and says that the said D. did not demise the tenements aforesaid to the said R. in manner and form as the said D. has above thereof declared against him, and of this he the said T. puts himself on the country.

(*t*) Fitz. Briefs, 817. 29 E. 3. 47. *Infra*, Chap. X. § 2.

In 43 E. 3. 19 (u), which was a writ of intrusion on a demise by demandant's ancestor, the tenant pleaded that the ancestor never had any thing in the premises; and it was objected that he ought to have traversed the demise by the ancestor, and not his seisin; but the plea was held good. I have before suggested that this plea might perhaps be considered bad, as being argumentative (x); but if it was a good plea in the case cited, there seems to be no reason why it should not be good also in the writ for which the preceding plea is proposed. But whether it is proper or not in the case of a demise alleged to have been made by the demandant or his ancestor, it would certainly be allowed in the case of an alienation by a tenant in dower, or by the curtesy; because in those cases there is no such demise to be traversed, either directly or argumentatively; and yet the tenant must have a right to traverse the estate, of the demandant or his ancestor, on which the action is founded.

I proceed to give such a form, for the count No. 2, in the preceding section.

And the said T. comes and defends his right when, &c. and says that the said F. never had any thing in the tenements aforesaid with the appurtenances, in manner and form as the said D. has above thereof alleged; and of this he puts himself on the country.

5. Plea, that demandant's ancestor had nothing, &c.

It appears that this form of pleading was not uncommon in ancient times, when it was intended to put in issue the estate or seisin alleged by the adverse party. But the plea, that the party *was never seised*, seems also to have been used for the same purpose; and may perhaps be thought more correct in form.

Such a plea might be as follows:

And the said T. comes and defends his right when, &c. and says that the said F. never was seised of the tenements aforesaid

6. Plea, that demandant's ancestor was never seised.

(u) Fitz. Intrusion, 2. Bro. Intrusion, 3.

(x) Supra, Ch. VI. § 2. See also Fitz. Issue, 7. 7 E. 3. 11. (309.) Long 5to. E. 3. 11.

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with the appurtenances in his demesne as of fee, (*or*, that the said R. and A. his wife never were seised, &c.) in manner and form as the said D. has above thereof alleged; and of this he puts himself on the country.

Either of these two last pleas, if good at all, would be equally applicable to the case of an alienation by a tenant in dower, and by a tenant by the curtesy.

I am not aware of any pleas to the writ that are peculiar to this action.

As the writ and count in this action do not allege a wrongful entry on the part of the tenant, by the traverse of which he may put in issue his title to the land, there may be sometimes occasion for a special plea in bar. But this cannot often be necessary, if the action is rightly brought; and when the occasion arises, the plea must set forth the title on which the tenant relies, and of course will vary with all the variations of which such a title is susceptible. It is therefore unnecessary to present any form of such a plea.

If the demandant relies on a title in his ancestor, his heirship may be traversed as in other cases.

## CHAPTER VIII.

## SECTION I.

*Writs of Entry in Casu Proviso, and in Consimili Casu.*CHAP.  
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It was observed in the preceding chapter, sect. 1. that when a tenant in dower, by the curtesy, or for life, aliened in fee, in tail, or for the life of another, the party who had the remainder or reversion might immediately enter for the forfeiture. But such reversioner or remainder-man could not without entry, maintain any action for the land during the life of the party who had thus wrongfully aliened. To remedy this evil in the case of such alienation by a tenant in dower, (when the reversioner had lost his right of entry) it was provided by the statute of Gloucester, c. 7. (a) that the heir, or other person to whom the land ought to revert after the death of such woman, should have his recovery *presently*, by a writ of entry to be made for that purpose in the Chancery.

A writ was framed accordingly, like the writ of entry *ad communem legem*, with the addition of the clause following; "*Et quæ post dimissionem per ipsam R. præfato S. contra formam Statuti, &c. inde provisi, factam in feodo, ad præfatum D. reverti debet per formam ejusdem Statuti.*" (b) This is the writ in *Casu Proviso*.

The count also corresponds with that in the writ *ad communem legem*, excepting that it omits the averment of

(a) 6 Ed. 1. 2 Inst. 309.

(b) Regist. 235. 236. F. N. B. 206. F. G.

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the death of the alienor, and inserts instead of it the clause above mentioned.

The count is as follows :

1. Count in  
*Casu proviso*,  
in the *per.*

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. a certain messuage with the appurtenances in B. bounded, &c. which he claims as his right and inheritance, and into which the said T. has no entry but by one R. who demised the same to him in fee, which said R. held the same for her life, as tenant thereof in dower of the endowment of one F. formerly her husband, the father of the said D. whose heir he is ; and which after the said demise thereof so made by the said R. *contrary to the form of the statute in that case provided*, ought to revert to the said D. by the form of the statute aforesaid, as it is said. And whereupon the said D. saith that the said F. was seised of the said messuage with the appurtenances in his demesne as of fee, taking the profits, &c. and afterwards died so seised thereof ; after whose death the said R. who was the wife of the said F. held the same for her life as tenant thereof in dower, of the endowment of her said late husband, and was thereof seised accordingly in her demesne as of freehold, within thirty years now last past, (c) taking the profits, &c. And from the said F. the reversion of the said messuage with the appurtenances descended to the said D. who now demands the same as his only child and heir ; and into which the said T. has no entry but by the said R. who demised the same to him as aforesaid.

The statute of Gloucester provided only for the case of an alienation by a tenant in dower ; but by force of the statute of Westminster 2. (d) a like remedy was adopted for those who were injured by such alienations made by a tenant by the curtesy, or for life. The last mentioned statute, c. 24, provides that when in one case a writ is found, and in a like case, (*in consimili casu*) happening under the same right, and requiring the like remedy, no writ is found, the clerks of the Chancery (from which all such original writs were issued) shall agree in making a writ ; that the courts may not fail to administer justice to complainants.

All the common *actions on the case* have been formed

(c) See Supra, Ch. VI. § 1.

(d) 13 Ed. 1. 2. Inst. 404.

upon this statute ; but the name of this writ *in consimili casu* is derived, not merely from those words in the statute, but from a corresponding clause in the writ. The writ and count in this action resemble those *in casu proviso* ; excepting that the demise is not said to be made against the form of the statute, and the statute referred to is said to be “ *in consimili casu provisum* ;” as follows :

—and which after the said demise thereof so made by the said R. ought to revert to the said D. according to the form of the statute in the like case provided, &c.

2. Count, in  
*Consimili*  
*Casu.*

The estate of the particular tenant, whether by the curtesy or for life, will be stated in the usual form.

It is well settled that these two actions will lie also for him who has the remainder or reversion for life, or in tail (e).

It will be observed that there cannot be a remainder limited upon the estate of a tenant in dower, or by the curtesy. But in the former case, the person seised at the time of the assignment of dower may have an estate in tail, or for life ; and in the latter, the reversion may be originally in tail ; and in both cases, the person originally seised of the reversion may grant it in tail, or for life ; in all which cases, the party actually seised of the reversion at the time of the wrongful alienation by the particular tenant, may maintain one or the other of these two actions. There is an obvious reason why these actions should lie for him who has the remainder or reversion, in tail, even when he claims as heir, although he could not in such a case maintain the writ *ad communem legem*. When the particular tenant has thus wrongfully aliened, and the reversioner or remainder-man, in tail, takes advantage of the forfeiture, he does not claim merely *per formam doni* ; for according to the terms of the original gift he would not yet be entitled to the possession of the land. His claim to the present possession is in truth founded on the forfeiture arising from the wrongful aliena-

(e) 2 Inst. 310. F. N. B. 205. 206. 207. Bro. Ingressu ad com. legem, 3.

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tion made by the particular tenant; and his writ and count ought, upon the general principles which apply to real actions, to show this title, or foundation of his action. But after the death of the particular tenant, the reversioner or remainder-man in tail may have a writ of Formedon, in which it will make no difference whether the tenant in the action entered in virtue of a conveyance from the particular tenant, or whether he intruded after the determination of the particular estate. The claim, or title of the demandant in a writ *ad communem legem* is not founded on a supposed wrongful alienation by the particular tenant, but on the original gift or limitation, by force of which he is now entitled to the possession of the land. The heir in tail has therefore no occasion for the writ *ad communem legem*, nor for the writ on intrusion; but may always recover in a formedon, in cases where these two actions would lie for one who claimed to hold in fee-simple (f).

The alienation by the tenant for life is stated in these cases to have been made in fee; but if it should appear to have been in tail, or for the life of another, it will nevertheless maintain the writ (g).

In these actions also one of the degrees is lost. The person who first enters under the defective title is said to enter *by* the tenant for life; and in case of another alienation the writ is in the *per* and *cui*, as follows:

3. — in the *per*  
and *cui*, on  
alienation by  
tenant by the  
curtesy.

—into which the said T. has no entry but by one S. to whom one R. demised the same in fee, which said R. held the same for his life as tenant thereof by the curtesy, &c.

From the forms of most of the writs of these two kinds in the Register (h) it would seem that another degree was lost when the alienation was made by a tenant for life. In those cases it is said that the tenant has no entry but *by S. to whom* the demandant, or his ancestor de-

(f) See Bro. Ingressu ad com. legem, 1, that the lord, who has the reversion by escheat, may maintain this action.

(g) Lit. § 483. 2 Inst. 309. F. N. B. 206. F. G.

(h) 235. and seqq.

demised the same; so that another alienation would cause the writ to be in the post. But, there are two or three precedents in which the estate of the tenant for life is so stated that the writ might set forth two alienations, as follows:

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—into which the said T. has no entry but by one S. to whom one R. demised the same in fee, which said R. held the same for his life by force of a demise which the said D. (or, which F. the father of the said D., &c.) thereof made to the said R. for his life, &c.

4. The same, on alienation by tenant for life.

The writ in the *post* would be varied as usual:

—into which the said T. has no entry but after the demise which one R. thereof made to one S. in fee, which said R. held the same for her life as tenant thereof in dower, &c. (or, to which said R. he the said D. demised the same for the life of the said R.) and which after the said demise thereof so made by the said R. ought to revert to the said D. according to the form of the statute in that case provided, &c. (concluding, as in all the writs in the *post*) and whereof the said D. complains that the said T. unjustly deforces him.

5. Count in the *post*.

## SECTION II.

### *Pleas in writs of entry in Casu proviso, and in Consimili casu.*

The pleas in these actions, so far as they respect the original title of the demandant, would be the same as those in the preceding action. Of course the pleas, that the demandant or his ancestor did not demise (i), or had nothing in the premises, or was never seised, if proper in that action, may be used in these, without any alteration.

But these two writs contain an allegation of another demise, which is equally material to the maintenance of the action; to wit, the demise which is made by the tenant in dower, by the curtesy, or for life, to the tenant in

(i) Fitz. Briefe, 947. 7 E. 3. 54. (352.)



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the action, or to some one under whom he claims. This last demise (which is always alleged to have been in fee,) produces a forfeiture of the estate for life; without which forfeiture, the reversioner would not be entitled to the present possession of the land; and the plea traversing this demise must of course be in bar. The form of the plea will vary according to the circumstances.

Such a plea, to the count No. 1, in the preceding section, might be as follows:

6. Plea, that the tenant in dower did not demise.

And the said T. comes and defends his right when, &c. and says that the said D. his action aforesaid thereof against him ought not to have or maintain, because he says that one G. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee; and being so thereof seised, gave and demised the same to the said R. to have and to hold for the term of her life; so that after the death of the said R. the said tenements with the appurtenances should remain to him the said T. and his heirs and assigns for ever; by force of which said gift and demise the said R. was seised of the said premises in her demesne as of freehold, and afterwards died seised of such her estate therein; after whose death, the said T. entered into the said premises as in his said remainder, and was thereof seised in his demesne as of fee, by force of the gift and demise aforesaid; without this, that the said R. demised the tenements aforesaid with the appurtenances to him the said T. in manner and form as the said D. has above in his said writ and declaration alleged; and this he is ready to verify: wherefore he prays judgment if the said D. his action aforesaid thereof against him ought to have or maintain, and for his costs (k).

7. Replication, that she did demise.

And the said D. says that the said R. did demise the said tenements with the appurtenances to the said T. in manner and form as he the said D. has above thereof alleged; and this he prays may be inquired of by the country.

This seems to be the only replication that the demandant can make; as any other would be a departure from his count, or would falsify his own writ. It follows, that the title set out by the tenant, in the inducement to his traverse, is not material nor traversable. It is important only for his own sake, that he should state it truly, so as

(k) See Rast. Ent. 250.

not to estop or embarrass himself in making out his defence, in case another action should be brought against him for the same land.

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As the above plea shows a mistake in the entry of the tenant himself, he is required to state by whom he did enter; according to the rule mentioned above, Chap. VII. sect. 2. But according to the case there cited, from Fitz. Briefe, 817, when the original demise is alleged to have been to one, by whom the tenant entered, the tenant may traverse that demise, without stating how his grantor did enter (1).

Thus, to the count No. 3, in the preceding section, the plea traversing the demise of the tenant by the curtesy may be as follows :

And the said T. says that the said R. did not demise the said demanded premises to the said S. in manner and form as the said D. has above thereof in his writ and declaration aforesaid alleged; and of this he puts himself on the country (m).

8. Plea, that the tenant by the curtesy did not demise, to writ in the *per* and *cui*.

It may be further observed, with respect to the above plea, No. 6, that the facts there stated, if true, tend to show that the demandant was never seised of the reversion; and therefore the same facts might be given in evidence under the plea that the demandant's ancestor was never seised of the premises.

If on trial of the issue, on either of the two preceding pleas, it should appear that the tenant for life did demise, either in fee, in tail, or for the life of another, the verdict will be for the demandant; but if the demise was

(1) See also Fitz. Entre, 71, 72.

(m) See Rast. Ent. 25. Co. Ent. 642. In the Register, 228. a. there is a writ *ad terminum qui præterit*, in the *per* and *cui*, stating that the tenant had no entry unless by C. to whom D. the father of the demandant, demised it for a term that is passed; and there is subjoined a *Nota*, "that if the tenant says that the said C. did not enter by the said D." (which is in effect the same as pleading that D. did not demise to C.) "he shall not say by whom C. did enter; his plea is to the action. But if he says that he himself did not enter by C. he ought to say, by whom he did enter."

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for his own life only, though made to the person mentioned in the writ, the verdict will be for the tenant; because this latter is not such a demise as is intended in this action, and does not produce a forfeiture of the particular estate (n).

When from the grounds of defence, disclosed in the plea or otherwise, the demandant perceives that he has misconceived his action, and that he cannot prove the demise, as he has alleged it, he would probably be allowed, on proper terms as to costs, to amend his writ and declaration, whenever it could be done without manifest injury to the tenant: and the same liberality would no doubt be extended to all the other writs of entry.

If it should be pleaded to either of these actions, that the tenant for life is *now* dead; the demandant may reply, that he was alive at the commencement of the action (o). In 38 H. 6. 3. Fitz. Issue, 101, it seems to have been thought proper, in a writ of *consimili casu*, to plead that the tenant for life did not aliene *in fee*. This opinion was questioned, and a writ of error was brought to the King's Bench, where the case went off on another point (p). This case cannot be considered a sufficient authority to overrule that of 40 E. 3. 5. Bro. Issue, 44 (q), and the opinion of Littleton, sect. 483, to wit, that the plea ought to be, that the tenant for life did not aliene *in manner and form as the demandant has alleged*, &c. without adding the words "in fee."

In Fitz. Entre, 67, in *consimili casu*, on an alienation by one C. to whom the demandant had demised for life; the tenant pleaded that the demandant by his deed, &c. gave the premises to the said C. and his heirs in fee, and made profert of the deed; and the demandant was obliged "to answer to the deed."

(n) Lit. § 483. 2 Inst. 309. F. N. B. 206. G.

(o) Fitz. Briefe, 807. (p) 38 H. 6. 30.

(q) Fitz. Issue, 142. S. C.

## CHAPTER IX.

## SECTION I.

*Writ of Entry ad Terminum qui præteriit.*

THIS is the last of that class of actions which lie for him in remainder or reversion after the determination of a particular estate. It lies when one makes a lease for life, or years, and the lessee, or any one who at the expiration of the term is in possession of the land demised, withholds it after the expiration of the term, from the lessor, or his heir, or assignee.

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This description corresponds with that given by Sir William Blackstone (a). In other books which speak of this action (b), it is not said that the stranger must be in possession at the expiration of the term; nor is it expressly stated that he must hold by, or under, the first lessee. Yet if the stranger entered in any other manner, the reversioner or remainder-man has other more appropriate remedies. If a lessee for life dies seised, and a stranger afterwards enters, without any title derived from the lessee, this is *an intrusion*. If the original lease were for years, and a stranger enter in like manner after the expiration of the term, this is a *disseisin* to the landlord. The cases therefore to which this action is peculiarly adapted, are those in which the tenant for years, or for the life of another, holds over after the expiration of his term; or when the tenant for life or years assigns all his estate to a stranger, who holds over in like manner. Accordingly in the writ in the second degree it is said

(a) 3 Com. 173.

(b) F. N. B. 201. Finch's L. 263. Booth, 195.

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that the tenant has no entry but *by* the tenant for life, or for years, to whom the demandant demised it (c).

This action will also lie in one case concurrently with the writ *ad communem legem*. As, if a lessee for life aliene in fee, in tail, or for the life of another, the reversioner or remainder-man may have either of these actions, at his election (d).

The particular estate must be *a term*, created by some grant or conveyance, as a lease for life or for years; and not an estate created by law, as a tenancy in dower or by the curtesy.

This writ in its simplest form, that is, when the demise was made by the demandant to the tenant, for the life of another, may be as follows :

1. Count, on demise by demandant to tenant, for the life of another.

Summon T. to answer to D. in a plea of land, wherein he demands against the said T. such a piece of land which he the said D. demised to the said T. for a term which is past, as it is said. And whereupon the said D. says that he himself was seised of the said piece of land with the appurtenances in his demesne as of fee and right, taking the profits, &c. and being so thereof seised he the said D. on the — day of — demised the same to the said T. for the term of the natural life of one F. by force whereof the said T. afterwards, within thirty years now last past (e), was seised of the said piece of land with the appurtenances in his demesne as of freehold for the term aforesaid, which said term is now past; [and whereof the said D. complains that the said T. deforces him.]

If the demise were for years, say,

2. — on like demise for years.

—demised the same tenements with the appurtenances to the said T. for the term of ten years thence next ensuing, by force whereof the said T. entered into the said tenements with the appurtenances, and afterwards, within thirty years now last past, was thereof possessed for the term aforesaid, which said term is now past; [and whereof the said D. complains that the said T. deforces him.]

In this writ there is no tort expressly charged on the

(c) Regist. 228.

(d) F. N. B. 208.

(e) See *supra*, Chap. VI. § 1.

tenant, and I have therefore proposed to add the allegation of deforcement at the close. This allegation is not found in the English practice, unless when the writ is in the *post*; and then it is inserted in this, and in all the other writs of entry. The insertion of it here cannot vitiate the count, as the tenant is literally a *deforciant*; and it serves to introduce the words of the writ, which follow according to the form prescribed by our statute, to wit, "to the damage of the said D. as he saith," &c.

I have found but one precedent of a count on a demise made by the demandant to the tenant, and that is a form prepared by Booth (*f*). He refers indeed to Rastel, as if he had taken the form from that book; but both of the precedents in Rastel are of writs in the *post* (*g*); as are all the others that I have seen (*h*). All these counts in the *post* conclude "*et quæ post terminum illum ad præfatum D. reverti debet*;" and Booth concludes his in the same manner. This conclusion seems unnecessary when the writ is within the degrees. In the Register (*i*) all the writs *ad terminum qui præteriit* in the *post* contain that clause, but it is omitted in all the writs within the degrees; and in other analogous cases it is confined to writs in the *post* (*k*); and I have accordingly omitted it in the above forms. I have however thought it best to add, at the close of the count, a distinct averment that the term is now past; which would of course be omitted, if the above clause, *et quæ post terminum*, &c. were inserted.

In one of the counts in Rastel the demise is set forth specially, as it is in the forms which I have above proposed. In all the other precedents, the demise is stated in the count, in the same manner as it is in the writ; that is, after setting forth the seisin of the lessor, the count proceeds, "and the said D. being so thereof seised, demised the said tenements with the appurtenances to the said R. for a term which is past;" without showing particularly the commencement or duration of the term,

(*f*) 196.      (*g*) 25.      (*h*) Co. Ent. 216. Herne, 388, 389.

(*i*) 227, 228.      (*k*) Supra, Chap. VI. § 1.

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nor whether it was for life, or for years. The first mentioned count is on a demise made by the demandant himself, and all the others are on a demise by an ancestor; but this would not probably make any difference in the manner of stating the commencement or duration of the particular estate. In the one case indeed it is his own act, and in the other it is the act of another person. But to this it may be answered that in every such case the demandant must be privy in blood, or in estate, to the original lessor; and that the demise stated by him is traversable, and of course he must be prepared to prove it when he commences his action; and he will therefore be always able to state it in the count as precisely as if it were his own act. It cannot in any case be amiss to state the demise in this special manner, and I have prepared the forms accordingly. If the other mode should be preferred, this form may be altered by omitting all the words after the averment of the demandant's seisin, and inserting in their stead those which are above transcribed from the English precedents. The allegation of forfeiture by the tenant should be added, for the reason before given.

If the demise was made by an ancestor of the demandant, the form may be varied as follows:

3. — on demise  
by demand-  
ant's ancestor.

——which he claims as his right and inheritance, and into which the said T. hath no entry but by one F. the father of the said D. whose heir he is, who demised the same to the said T. for a term which is past, as it is said. And whereupon the said D. says that the said F. was seised, &c. taking the profits, &c. and being so thereof seised on the — day of — demised the same to the said T. for the term, &c. by force whereof the said T. afterwards, within thirty years now last past, was seised of the said premises in his demesne as of freehold for the term aforesaid, which said term is now past; and from the said F. the reversion of and in the said premises descended to the said D. who now demands the same as the only child and heir of the said F. and into which the said T. hath no entry but by the said F. who demised the same to him for the said term which is past as aforesaid, and whereof the said T. forfeits him the said D.

If the term expired in the life time of the ancestor, the reversion would not, strictly speaking, descend to the heir; and he would aver accordingly, that *the right to the reversion descended*; but this distinction does not appear to be material (l).

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This action will lie for the assignee, or grantee of the reversion (m); but there is no writ in the Register for such a case, nor have I found any such count in any of the books of entries. The following form is prepared from similar writs and counts in other cases.

—into which the said T. hath no entry but by one A. who demised the same to him for a term which is now past, and which same A. afterwards assigned to the said D. the now demandant, the reversion of and in the said tenements with the appurtenances expectant on the determination of the term aforesaid, as it is said. And whereupon the said D. says that the said A. was seised, &c. (*stating the demise, and the seisin, or possession, of the lessee, as in the preceding form*) and afterwards, and whilst the said T. was so seised (or, possessed) as aforesaid, to wit, on the — day of — the said A. being seised of the reversion of and in the said premises expectant on the determination of the said term, did by his deed of that date duly signed, sealed, acknowledged and registered, for a certain valuable consideration therein expressed grant and assign to the said D. and his heirs and assigns forever the said reversion expectant as aforesaid; by force whereof he the said D. was seised as of fee of the said reversion of and in the said premises expectant as aforesaid, and into which said premises the said T. hath no entry but by the said A. who demised the same to him for the said term which is past as aforesaid, and whereof the said T. deforces him the said D.

4. Count by assignee of the reversion.

There seems to be no reason why this action should not lie for a remainder-man in fee, as well as for an assignee of the reversion; although it is said that an action of formedon will lie in such a case. I presume that the writ *ad terminum qui præteriit* will also lie when the reversion is assigned for life, or when the remainder is originally limited for life. When the remainder is originally limited

(l) See Rast. Ent. 25. b. pl. 2. 8 Co. Rep. 170.

(m) F. N. B. 202.



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in tail, after an estate for life, a writ of Formedon in remainder is in all cases an adequate remedy, and it is obviously the most appropriate. So it is, when the reversion after an estate for life is granted to a stranger in tail.

In the *per* and *cui* the form would be as follows :

5. Count in  
the *per* and  
*cui*.

—into which the said T. hath no entry but by one R. to whom he the said D. (the demandant) demised the same for a term which is now past, &c. *or*, no entry but by one R. to whom one F. the father of the said D. whose heir he is, demised the same for a term which is now past, &c.

In the *post* there is a further variation, as usual in other writs in the *post* :

6. — in the  
*post*.

—into which the said T. hath no entry but after the demise which he the said D. (*or*, which one F. the father of the said D. whose heir he is,) thereof made to one R. for a term which is past, and which after the expiration of that term ought to revert to the said D., as it is said. And whereupon the said D. says, &c. (*stating the seisin of the lessor, and the demise, &c. as in the preceding forms*) and which after the expiration of that term ought to revert to the said D. as aforesaid ; and whereof he complains that the said T. unjustly deforceth him.

## SECTION II.

### *Pleas in writs ad terminum qui præteriit.*

The common bar, or what may be called the general issue, in this action is, that the demandant or his ancestor did not make the demise set forth in the writ (*n*) ; like the plea No. 4, *supra*, Chap. VII. sect. 2. The plea that the supposed grantor was never seised in fee, or that he had nothing but for a term of years, &c. would not be good in most cases ; for though he had only a particular estate, yet if he demised to another for life, or for any estate greater than he could lawfully make, he thereby acquired the reversion in fee (*o*).

\* (*n*) Rast. 25. Herne's Plead. 388. (484.) F. N. B. 202.

(*o*) Fitz. Issue, 7. 7 E. 3. 11. (309.) Long 5to. E. 3. 11.

In 7 E. 3. 9. (307.) Fitz. Voucher, 149, in *ad terminum qui præteriit* after a lease for years by demandant to one I.; the tenant pleaded that the demandant afterwards, by his deed (of which he made *profert*) granted and confirmed the tenements to the said I. for the life of the demandant; and this was held a good plea; and the demandant replied *non est factum*.

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## CHAPTER X.

## SECTION I.

*Writs of Cui in Vita ; and Cui ante Divortium.*

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THESE two actions, like those in the seventh and eighth chapters, are founded on a conveyance by one who has a lawful estate in the land, and who can therefore deliver seisin and possession to his grantee ; but who undertakes to grant a greater estate than he himself has in the land. This conveyance however differs from those mentioned in the said two chapters, inasmuch as this does not produce a forfeiture of the estate of the husband who alienes ; but the conveyance is valid and effectual until his death, or the dissolution of the marriage.

The writ of *Cui in Vita* lies when the husband alienes his wife's land in fee, in tail, or for the life of another ; and it is brought by the wife after the death of her husband. If the wife dies without bringing the action, her heir may have a *Sur cui in vita*. The action lies for the wife, whether her estate were in fee-simple, fee-tail, or for life ; but if it were an estate-tail, her heir can maintain no action but a Formedon in descender.

When the woman was seised in fee, the writ and count in *cui in vita* may be as follows :

1. Count by  
the widow.

Summon T. to answer to D. in a plea of land, wherein the said D. who was the wife of H. late of — deceased, demands against the said T. a certain piece of land, &c. which she claims as her right and inheritance, and into which the said T. has no entry but by the aforesaid H. formerly the husband of the said D. who demised the same to him, and whom in his life time she could not oppose, as it is said. And whereupon the said D. says that within thirty years now last past she the said D. together with the said

H. her said husband were seised of the said demanded premises in their demesne as of fee, in right of the said D. taking the profits, &c. and into which the said T. hath no entry but by the said H. who demised the same to him as aforesaid.

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In some of the precedents the wife is said to have been seised "*simul cum*," &c. that is, *together with her husband*; though in most of them it is omitted. The clause may not be material, but it cannot vitiate the count; and it is the regular form of stating such a seisin in other cases.

I have alleged the seisin of the demandant within thirty years; although it is questionable whether this is an action "upon the seisin or possession" of the wife, within the meaning of the Statute of Limitations (a). The action seems rather to be founded on the wrongful alienation by the husband. The statute 32 Hen. 8, c. 2, which contains a like provision for the limitation of real actions, has been held not to apply to cases in which it is not necessary to allege a seisin, or in which the seisin is not traversable, and cannot become the subject of evidence or trial (b). If then the seisin of the wife is not traversable, it would appear unnecessary to aver it to have been within the time of limitation. On this point there is much diversity of opinion in the ancient books. In most of the cases that are found in those books, the wife claims as tenant in tail, or for life, and of course is required to state the commencement of her estate, as, upon the gift or demise of such an one; and the question has been, whether the tenant can traverse the gift thus alleged. The cases may be found collected in the Abridgments of Fitzherbert, Brooke, and Viner, under this title; and the weight of authority seems to be in favour of allowing the traverse. In 2 Ed. 4. 13, Littleton says that when in a *Cui in vita*, the demandant claims to hold for term of her life, when in truth she never had any estate in the land, the tenant may plead that she was never seised for term of her life in manner and form as she alleges. But when

(a) Stat. 1786, c. 13.

(b) Co. Lit. 115. and Hargrave's note. 8 Co. 128. Foster's case.

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the wife was seised in fee, she does not mention the commencement of her estate, and there is therefore no gift to be traversed; and I have not found any case of that kind, in which her seisin is put in issue. If it is not necessary to allege and prove her seisin, or if the action is founded on the alienation by the husband, and not on the seisin of the wife, it may be brought by the widow or her heir without any limitation of time; the case not being within the statutes of limitations. And on the other hand, if it is founded on the seisin of the wife, the action of the widow, and of her heir, will be wholly barred by our statutes, if the husband should happen to live thirty years after his alienation; and if he should live forty years, the heir would be also barred of his writ of right. This last is perhaps the least of the two evils; as the case will not often occur; and even when the husband should live so long as to bar all actions by the widow and her heir, they are still not without a remedy. The statute 32 Hen. 8, c. 28, provides that such an alienation by the husband shall not make any discontinuance of the wife's estate, nor be prejudicial to the wife or her heirs, but that she or they may enter notwithstanding such alienation. The writ of *cui in vita* seems to have been wholly disused in England since this last statute; and as this was passed at the same session with the Statute of Limitations before mentioned, we find no case in which the construction of the latter as applied to this action has been brought in question.

In this writ, as the demandant was seised in fee-simple, I have inserted the clause, *quod clamat esse jus et hereditatem suam*, in compliance with the rule in the Register, 228 (c), and with the forms of the writs of this kind, in the same book, 232. This clause is held to be unnecessary in every other writ of entry in which the demandant alleges a seisin in himself.

When the wife was seised in fee-tail, or for life, her estate and title are specially set forth in the count, and they are briefly stated in the writ also. The Register (d)

(c) And see F. N. B. 201.

(d) 232.

contains a great number of writs; which vary according to the nature of the estate, and the manner in which it came to the wife. It is unnecessary to give many of them here, as they may be readily framed to suit each particular case, by reference to the writs of Formedon, which they very nearly resemble in form.

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If the wife was the original donee in tail, the form may be as follows:

—which she claims to hold to her and the heirs of her body issuing, of the demise which one G. thereof made to her, and into which the said T. hath no entry but by the said H. formerly the husband, &c. And whereupon the said D. says that the said G. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and being so thereof seised, gave the same tenements with the appurtenances to the said D. and the heirs of her body lawfully issuing; by virtue of which gift she the said D. within thirty years now last past, was seised of the same tenements with the appurtenances in her demesne as of fee-tail, taking the profits, &c. and afterwards, to wit, on the — day of — the said D. being so thereof seised, took to her husband the said H. by virtue whereof the said H. and D. then became and were seised of the said tenements with the appurtenances in their demesne as of fee-tail in right of the said D. by the form of the gift aforesaid, taking the profits, &c. and into which the said T. hath no entry but by the said H., &c.

2. — by the widow, tenant in tail.

If the marriage took place more than thirty years before the commencement of the action, her seisin, and that of herself and her husband, may be stated as follows:

—by virtue of which gift she the said D. thereupon became and was seised, &c. taking the profits, &c. and afterwards, &c. took to her husband the said H. by virtue whereof the said H. and D. then became and were seised, &c. taking the profits, &c. and continued so seised thereof long afterwards, and within thirty years now last past; and into which the said T. hath no entry, &c.

3. — *aliter*.

If the gift were made to an ancestor of the wife, the form may be varied as follows:

—which she claims to hold to her and the heirs of her body issuing, of the demise which one G. thereof made to one F. the fa-

4. — *aliter*.

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ther of the said D. and to the heirs of the body of the said F. issuing, and into which, &c. And whereupon the said D. says that the said G. was seised, &c. and gave, &c. to the said F. and the heirs of his body lawfully issuing, by force whereof the said F. was seised of the said tenements with the appurtenances in his demesne as of fee-tail by the form of the gift aforesaid, taking the profits, &c. and from the said F. the tenements aforesaid with the appurtenances descended to the said D. the now demandant as the only child and heir of the said F. of his body lawfully issuing, by force whereof she the said D. together with the said H. her husband entered into the said tenements with the appurtenances, and within thirty years now last past were thereof seised in their demesne as of fee-tail in right of the said D. by the form of the gift aforesaid, taking the profits, &c. and into which, &c.

In this case the estate is supposed to have descended to the woman after the marriage. If it descended to her whilst sole, the count should state accordingly her sole seisin, her subsequent marriage, and the seisin of herself and her husband, as in the other forms.

As the estate-tail in this case comes to a daughter, she must show herself to be the only child, because such an estate goes to all the daughters. When a son is stating the descent of an estate-tail to himself, he calls himself the eldest son.

If the woman claims as tenant for life, the form may be as follows :

5. — by the widow, tenant for life.

— which she claims to hold for the term of her life, of the demise which one G. thereof made to her, and into which, &c. And whereupon the said D. says that the said G. was seised, &c. and being so thereof seised demised the same to her the said D. for the term of her life, by force whereof she the said D. together with the said H. her husband, within thirty years now last past, were seised of the said tenements with the appurtenances in their demesne as of freehold, in right of the said D. for the term of her life, taking the profits, &c. and into which, &c.

If the demise were made before the marriage, the form may be varied accordingly.

When she claims as tenant in dower, the writ and count may be as follows :

—which she claims to hold for her life, as tenant thereof in dower, of the endowment of one G. her first husband, and into which the said T. has no entry but by the said H. the second husband of her the said D. who demised the same to him, and whom in his life time she could not oppose, as it is said. And whereupon the said D. says that the said G. during the intermarriage between him and the said D. was seised of the said tenements with the appurtenances in his demesne as of fee (or, in his demesne as of fee-tail) taking the profits, &c. and afterwards died so seised thereof; after whose death she the said D. held the same as her dower of the endowment of the said G. and was thereof seised accordingly in her demesne as of freehold for her life, within thirty years now last past, taking the profits, &c. and afterwards, to wit, on the — day of — the said D. being so thereof seised, intermarried with the said H. her said second husband, by virtue whereof the said H. and D. then became and were seised of the said tenements with the appurtenances in their demesne as of freehold, in right of the said D. for her life, taking the profits, &c. and into which, &c.

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6. — by widow, tenant in dower.

In the *Per* and *Cui*, the writ will be varied as follows :

—into which the said T. has no entry but by one S. to whom the said H. formerly the husband of the said D. demised the same, and which said H. in his life time she the said D. could not oppose, &c.

7. — in the *per* and *cui*.

In the *Post*, it is as follows :

—into which the said T. has no entry but after the demise which the said H. formerly the husband of the said D. and whom in his life time she could not oppose, thereof made to one S. as it is said. &c. (adding at the conclusion of the count, the clause which is inserted in all the writs of entry in the *post*, viz.) and whereof she complains that the said T. unjustly deforceth her.

8. — in the *post*.

In a note to Fitzh. N. B. 193, there is a precise rule laid down as to the place in which to insert the clause, *cui in vita*, when the writ is in the degrees, and when it is in the *post*. The whole object of the rule is to make the name of the husband the last antecedent to that clause, so as to prevent any ambiguity in the whole sentence. This may be sometimes better effected by a different mode of expression, like that in the above writ in



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the *per and cui* ; and there is a precedent in Rast. Ent. 139. b. in which it is so expressed.

When the action is brought by the heir of the wife, it is called a writ of *Sur cui in vita* ; and varies but little from the preceding forms. This last action lies only when the wife was seised in fee-simple (*e*) ; and of course the writ must contain the clause, *quod clamat esse jus et hereditatem suam*, and the demandant must state the descent to himself. The form may be as follows :

9. — *sur cui in vita.*

— which he claims as his right and inheritance, and into which the said T. has no entry but by one H. formerly the husband of one M. the mother of the said D. whose heir he is, which said H. whom in his life time she the said M. could not oppose, demised the same to the said T. as it is said. And whereupon the said D. says that within thirty years now last past, the said M. together with the said H. her late husband were seised of the said tenements with the appurtenances in their demesne as of fee, in right of the said M. taking the profits, &c. and from the said M. the right to the tenements aforesaid with the appurtenances descended to the said D. as the only child and heir of the said M. and into which, &c.

This writ lies also in the *Per and cui*, and in the *Post* ; and will vary accordingly, as in the preceding forms.

In these two writs the husband is said to have demised the land ; but by the stat. Westm. 2. c. 3, the wife has the like remedy in some cases, when the husband loses the land by default, in an action brought against him and his wife. The statute literally applies only when the wife had an estate in fee-simple ; but Lord Coke, in his commentary on it (*f*), says that the wife shall have the same remedy when the husband loses her estate for life in that manner ; for that this is, as it were, a demise made by the husband. The writ and count are in the same form as if the husband had demised by deed or by any conveyance *in pais* ; and if the tenant traverses the demise, the demandant may in her replication set forth the recovery, as equivalent to a lease, and so maintain her writ (*g*).

(*e*) Thel. Dig. L. 11. c. 44. § 10. Fitz. Cui in vita, 33. Age, 76.

(*f*) 2 Inst. 343.

(*g*) Reg. 235.

If the wife had an estate-tail in the lands so recovered against her husband, she cannot have a *cui in vita*; but instead of that, it is said that she may have a *Quod ei deforceat*, according to the provisions of the stat. Westm. 2. c. 4 (*h*), and she may also undoubtedly have a writ of Formedon.

This statute does not mention the heir of the wife. If he is not within the equity of the statute, so as to maintain a *Sur cui in vita* upon such a recovery against the husband, his only remedy at that time was a writ of Right. Since the stat. 32 Hen. 8. c. 28, such a recovery would be no discontinuance of the wife's estate; and of course she or her heir may enter after the death of the husband (*i*).

The writ of *Cui ante divortium* is in all respects like the *cui in vita*, excepting that it supposes a divorce between the husband and wife, instead of supposing the death of the husband.

By our statute, regulating marriage and divorce (*k*), when a divorce is had for the cause of affinity, consanguinity, or impotency of either party, "the wife shall have restored to her all her lands, tenements and hereditaments." This extends undoubtedly to all that she had at any time during the coverture, and which she has not lawfully aliened. No process issues in the suit, or upon the decree of divorce, to put her in possession of the lands; but she must pursue her remedy at common law, by entry or by action. The statute makes no express provision as to the lands of the wife, when the divorce is had for the cause of adultery committed by the husband. But a divorce in that case, as well as in the others before mentioned is, by our statute *a vinculo matrimonii*; upon which the woman would be entitled at the common law to reclaim all the real estate which she held in her own right. It is manifestly the design of the statute to put the wife in this case in the same situation as if the

(*h*) 2 Inst. 343. 347.

(*i*) Co. Lit. 326. 8 Co. R. 142. Grenley's case.

(*k*) Stat. 1785, c. 69.

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husband were dead ; and on the other hand, when the divorce is had for the adultery of the wife, it is provided in the same section of the statute that the husband shall hold her personal estate for ever ; and her real estate during his life, in case they have had issue born alive during the marriage ; otherwise during her life.

In the English practice the divorce is not set forth specially in the count, nor is the cause of it stated, because the right of the demandant to maintain the action is not in any manner affected by that circumstance ; but after every divorce *a vinculo*, the woman is immediately entitled to all her lands. But under our statute there is, as we have seen, one case of such a divorce in which the woman is not entitled to her lands during the life of the husband. It seems therefore necessary in our law to set forth the divorce specially, so as to show that it was not for the adultery of the wife.

I therefore propose the following form :

10. — *Cui ante  
divortium.*

Summon T. to answer to D. in a plea of land wherein the said D. who was formerly the wife of H. of — demands, &c. which she claims as her right and inheritance, and into which the said T. has no entry but by the said H. formerly the husband of the said D. who demised the same to him, and whom before the divorce had between them the said H. and D. she could not oppose, as it is said. And whereupon the said D. says that within thirty years now last past, she the said D. together with the said H. her then husband were seised of the said tenements with the appurtenances in their demesne as of fee in right of the said D. taking the profits, &c. [and afterwards, to wit, at the Supreme Judicial Court begun and held at B. within and for the County of S. on the — Tuesday of — in the year of our Lord — by the decree of the Justices of the same court in a certain cause of divorce between the said H. and D. then pending in the same court, at the suit of the said D. for the cause of adultery committed by the said H. her said then husband (or, for the cause of affinity, or, of consanguinity, between the said H. and D. &c.) a divorce from the bond of matrimony between the said H. and the said D. was decreed and ordered for the cause aforesaid, as by the record thereof in the same court remaining appears ;] and into which said tenements with the appurtenances the said T. has no entry but by the said H. who demised the same to him as aforesaid.

If this special statement of the divorce, and of the cause of it, should be deemed unnecessary, the above count may be made like those in the English practice, by striking out all that is included in the brackets; that is, from the averment of the taking of the profits to the words, "and into which," &c.

This writ may be brought in the *Per and Cui*, and in the *post*; and the heir of the woman may have a *Sur cui ante divortium*, if she dies without having recovered the land.

After the death of the husband, the woman who has been divorced, and her heir, may maintain respectively a *cui in vita*, or *sur cui in vita*, without mentioning the divorce, whatever may have been the occasion of it. They may also enter, by force of the stat. 32 Hen. 8. c. 28. (1).

## SECTION II.

*Pleas in writs of Cui in vita, and Cui ante divortium.*

In these actions, as in the others founded on a demise by one who could not lawfully make such a conveyance, the tenant may traverse either the supposed demise, or the previous title of the demandant or his ancestor.

It is therefore a good plea to say that the husband did not demise; as follows:

And the said T. comes and defends his right when, &c. and says that the said H. did not demise the tenements aforesaid with the appurtenances to the said G. (or, to him the said T.) in manner and form as the said D. has in her writ and declaration aforesaid above alleged; and of this he puts himself on the country (m).

11. Plea, that the husband did not demise.

So in an action against three persons, on a demise alleged to have been made to them; one disclaimed, and the other two were allowed to plead that the husband

(1) Co. Lit. 326.

(m) Co. Ent. 642. F. N. B. 194. Fitz. Briefs, 448. 911. Cui in vita, 12. Long 5to. E. 4. 10.

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demised to that one, *by* whom they entered, "without this that he demised to the three as alleged," &c. and this seems to have been pleaded in bar (*n*).

In this latter case the plea shows *by whom* the tenants did enter, according to the course mentioned above, Chap. VII. sect. 2 : but this statement is not contained in the precedent above copied from Co. Ent. 642, nor in any of the other cases above cited ; and in 8 E. 3. 45. (413.) Fitz. Cui in vita, 12. the plea was objected to for that cause, but it was held good, "because the action was founded on that demise."

If the demandant counts on a seisin in fee, it seems to be a good plea to say that she had nothing in the premises, but as the wife of the said H. (*o*) The replication to that plea is, that she was seised in fee ; it appears therefore that a plea, denying that she was ever seised in fee, would have the same effect (*p*).

When the demandant counts on an estate tail or for life, the tenant may put the title in issue, either by pleading that the demandant was never seised for her life in manner and form, &c. (*q*) or that she never had any thing by the gift or demise of the supposed donor (*r*). So he may directly traverse the gift set forth in the count, as is done in the general issue to a Formedon (*s*). This latter form seems to have been used, when the demandant counts on

(*n*) Fitz. Briefe, 911. 29 E. 3. 47.

(*o*) Townsend's tables, Cui in Vita, cites Vet. intr. (Liber intrationum) 145. There is, in the place cited, a plea of this kind, which may have been intended for a writ of *cui in vita* ; but there is no such count there. The count which precedes this plea seems to be intended for a *consimili casu*, instead of a *cui in vita* ; and in the margin it has both names given to it. The whole entry is much confused, in consequence of misprint, or some other cause ; and perhaps the citation proves only the opinion of Townsend, that this is a good plea in the writ of *cui in vita*.

(*p*) See Supra, Chap. VII. § 2. no. 5. 6.

(*q*) By Littleton, 2 E. 4. 13. Fitz. Cui in vita, 3.

(*r*) Fitz. Cui in vita, 6. 29. Briefe, 795. But see *ib.* Cui in vita, 5.

(*s*) Fitz. Cui in vita, 13.

an estate tail; and the plea, that she never had any thing of the demise of the supposed donor, when she counts on an estate for life only; but probably both forms would be deemed equally correct, in each case.

So it seems to be a good plea that the demanded premises were exchanged for others, which the wife now holds (*t*). But this must be, probably, an exchange by the husband and wife; taking an estate to the wife, in the lands received in exchange, like that which she had in the demanded premises. It is also a good bar, that the husband and wife demised, reserving a rent; and that the widow accepted the rent after the death of her husband (*u*). Otherwise if the husband alone had demised (*x*).

The heir cannot maintain a *sur cui in vita*, in the life time of his father (*y*); because the father was entitled to be tenant by the curtesy, and as his conveyance is not a forfeiture of his estate, it seems that it will pass all that he could have lawfully conveyed. So if the conveyance is made by a second husband, who was entitled to be tenant by the curtesy, the issue of the wife by her first husband cannot maintain the action during the life of the second husband (*z*).

There is in Rast. 138, a plea in *cui ante divortium*, that the divorce was surreptitiously and fraudulently obtained, and that the decree has been reversed since the last continuance. The plea concludes with praying judgment of the writ; but it is one of those pleas to the action of the writ, which shows a complete bar to the action in its present form, and which would undoubtedly be allowed in modern times as a bar to the action.

(*t*) Fitz. Cui in vita, 28.

(*u*) Bro. Acceptance, 10. 21 H. 7. 38. and see Fitz. Cui in vita, 1. 21 H. 6. 24.

(*x*) Bro. Cui in vita, 1. 26 H. 8. 2.

(*y*) Fitz. Cui in vita, 30.

(*z*) Fitz. Cui in vita, 26.

## CHAPTER XI.

## SECTION I.

*Writ of Sine assensu Parochiæ.*

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By the statute 1785, c. 51, the Minister or Ministers of the several protestant churches in this Commonwealth are made capable of taking in succession any parsonage lands, granted to the minister and his successors, or to the use of the ministers, and of suing and defending all actions touching the same. By the same statute it is enacted that no alienation made by the minister, of lands so held in succession, shall be valid any longer than he shall continue minister; unless he be the minister of a particular town, district, or precinct, and make the alienation with their consent respectively; or unless he be the minister of an Episcopal church, and make the alienation with the consent of the Vestry. The Provincial statute, 28 Geo. 2. c. 9, contained similar provisions on this subject.

If a minister has aliened the parsonage lands without such consent, his successor may, by force of this statute, enter on the grantee, or his assignee, and avoid the conveyance. The successor may also have a writ of entry founded on this defective conveyance, which by analogy to the common law writ, *Sine assensu Capituli*, has been denominated, *Sine assensu Parochiæ* (a). The writ, *sine assensu capituli*, lay for the successor of a Bishop, Dean, Abbot, or other like sole corporation, who had aliened the lands which he held in the right of his church, or house, without the assent of his chapter, or brethren, or convent; from reference to which I have prepared the following form for the minister of a Congregational Church.

(a) 2 Mass. Rep. 500. *Weston v. Hunt*.

Summon T. to answer to D. of B. clerk, and minister of the said town of B. (*or*, of the first parish in the said town of B.) in a plea of land, wherein the said D. demands against the said T. such a messuage which he claims as the right of the said town, (*or*, of his said parish) and into which the said T. has no entry but by one P. formerly the minister of the said town, (*or*, parish) and the predecessor of the said D. who demised the same to the said T. without the consent of the said town, (*or*, parish) as it is said: And whereupon the said D. says that, within thirty years now last past, the said P. was seised of the messuage aforesaid with the appurtenances in his demesne as of fee, in right of the said town, (*or*, parish) taking the profits thereof to the value, &c. and into which the said T. has no entry but by the said P. who demised the same to him without the consent of the said town, (*or*, parish) as aforesaid.

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1. Count, *sine assensu parochie*.

For the Minister of an Episcopal Church, the form may be varied as follows:

Summon T. to answer to D. of S. clerk, and minister and Rector of the Episcopal church in said S. called St. Peter's Church, in a plea of land, wherein the said D. demands against the said T. a certain piece of land, &c. which he claims as the right of his said church, and into which the said T. has no entry but by one P. formerly the minister and rector of the said church, and the predecessor of the said D. who demised the same to the said T. without the consent of the Vestry of the said church, as it is said: And whereupon, &c.

2. The like for the Rector of an Episcopal church.

The minister is called the predecessor of the demandant; but it is not necessary that he should have been the next immediate predecessor. Any successor may maintain the action, provided it be commenced within thirty years next after the alienation upon which it is founded; this being the period of limitation prescribed by our late statute (*b*). If the first incumbent should continue to be the minister for thirty years after such an alienation, this action would be barred; and if he should so continue for forty years, the successor would by the same statute be barred of his writ of right. But the successor would in all cases be entitled, by force of the statute 1785, c. 51, to enter, upon the death of the alienor, or upon his

(*b*) 1807, c. 75.



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ceasing to be the minister, whatever time may have elapsed after the alienation.

This writ lies also in the *per* and *cui*, and in the *post*; and the count will vary accordingly, as in other cases.

## SECTION II.

*Pleas in writs Sine assensu parochiæ.*

It is a good bar, to say that the predecessor did not demise; as follows :

3. Plea, that  
he did not de-  
mise, &c.

And the said T. comes and defends his right when, &c. and says that the said P. did not demise the said demanded premises to him the said T. in manner and form as the said D. has above thereof complained against him; and of this he puts himself on the country.

It is not proper to say, as is done in Rast. 593, "that he did not demise *without the assent of his parish*;" as that would be a negative pregnant; but on the plea, "that he did not demise *in manner and form*," &c. the tenant would be allowed to prove that he *did* demise *with the assent* of his parish (c). So it seems, from Fitz. Monstrans de faits, 178, that the tenant may plead, that P. did demise with the assent of his chapter, if he can produce their deed testifying their assent. With us, a deed would not be necessary to prove the assent of the parish; but they might assent by a vote. But as the tenant appears to have the same defence under the general plea of *non dimisit*, it can never be advisable to plead in this other manner.

So it is a good bar, that the chapter afterwards confirmed the grant or demise (d). Such a confirmation in England must be by deed; but here it may be by vote of the parish, either directly confirming the demise, or authorizing an agent to make a deed of confirmation.

(c) Fitz. Monstrans de faits, 178. Issue, 17. 120. Bro. Negative pregnant, 25. 33. Action sur Statute, 3. 27 H. 8. 21. In this last case, Fitzherbert, J. expressly states the law as it is here laid down. And see 38 H. 6. 3.

(d) Fitz. Entre, 79.

## CHAPTER XII.

## SECTION I.

*Writ of Dum fuit infra ætatem.*

THIS writ is founded on an alienation made by an infant, in fee, in tail, or for life. It may be brought by the infant himself, after his arrival at full age; and if he die, whether before, or after, attaining his full age, the action may be brought by his heir (*a*). It is well settled that the alienor cannot maintain this action while under age, although he may enter and take back the land; and the reason given for it by Lord Mansfield is, that the judgment would conclude the infant, and prevent his affirming the conveyance, if he should afterwards think it for his interest to do so; whereas he ought to have his election, on arriving at full age, to affirm or avoid it (*b*). This opinion of Lord Mansfield supposes that the infant, after having entered to avoid his conveyance, has still a right on arriving at full age to affirm it. If this is correct, the conveyance is not in effect avoided by the entry of the infant, but still exists as a voidable act until he arrives at full age; for a void act cannot be affirmed by a subsequent assent or agreement.

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The alienor may enter either whilst under age, or afterwards (*c*); and his heir has the same right; until the entry is barred by the Statute of Limitations, or in some other manner. By our Statute of Limitations, as the right

(*a*) F. N. B. 192. Com. Dig. tit. Enfant, (C. 4.) (C. 10.) 6 Co. R. 4. Co. Lit. 247.

(*b*) 3 Bur. 1794. 1808.

(*c*) Co. Lit. 337. 8 Co. R. 84. Whittingham's case. See Reg. 229. *a. semble contra.*

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of entry accrues to the alienor whilst under age, he is allowed ten years in addition to the twenty years, which is the common limitation of such a right.

When the action is brought by the alienor, the form may be as follows :

1. Count, *dum fuit infra ætatem*, by alienor.

Summon T. to answer to D. of — yeoman, who is now of full age as he saith, in a plea of land, wherein he demands against the said T. such a piece of land which he the said D. whilst he was under age, demised to the said T. as it is said : And whereupon the said D. says that within thirty years now last past he was seised of the said demanded premises in his demesne as of fee (or, in his demesne as of fee-tail and of right, that is to say, to him and the heirs of his body lawfully issuing—or, in his demesne as of freehold and right, for the term of his life) taking the profits, &c. and which he the said D. afterwards, and whilst he was under age, demised to the said T. as aforesaid ; and whereof the said T. now deforceth him.

The allegation of deforcement at the close is inserted for the reason mentioned in the other actions, in which there is no tort expressly charged against the tenant, or the person under whom he holds.

I do not find it expressly stated that this action will lie for a tenant in tail, or a tenant for life, upon his own alienation ; but there is no reason why such a tenant should not have this, as he may have the other writs of entry, for land of which he has been actually seised. If the tenant in tail, after such an alienation, die without having entered, or recovered the land, his heir cannot maintain this action ; but must enter, or bring a *Formedon in descender*.

If the action is brought by the heir of the alienor, the form may be as follows :

2. — by the heir of the alienor.

Summon T. to answer to D. in a plea of land, wherein he demands, &c. which he claims as his right and inheritance, and into which the said T. has no entry but by one F. the father (or other ancestor) of the said D. whose heir he is, who, whilst he was under age, demised the same to the said T. as it is said : And whereupon the said D. says that within thirty years now last past, the said F. was seised of the said tenements with the appurtenances in his demesne as of fee and right, taking the profits, &c. and from the said

F. the right to the tenements aforesaid with the appurtenances descended to the said D. who now demands the same as the only child and heir of the said F. and into which the said T. has no entry but by the said F. who, whilst he was under age, demised the same to the said T. as aforesaid; and whereof the said T. now de-forceth the said D.

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When the writ is in the *per and cui*, the form varies as usual :

—into which the said T. has no entry but by one S. to whom he the said D. (or, to whom one F. the father of the said D. whose heir he is,) demised the same, whilst he was under age, as it is said. 3. — in the *per and cui*.

In the *post* :

—into which the said T. has no entry but after the demise which the said D. (or, which one F. the father, &c.) whilst he was under age, thereof made to one S. as it is said: (adding, at the close, the clause “*et unde queritur*,” &c. as in the other writs in the *post*.) 4. — in the *post*.

It is said in F. N. B. 192, that the clause, “who is now of full age,” is inserted only when the writ is brought against the person to whom the demandant aliened, and is omitted when the writ is in the *per and cui*, or in the *post*. No reason is given for this omission, and no authority is cited. In Finch, 264, the same rule is laid down, for which he seems to rely wholly on Fitzherbert. On the other hand, this clause is inserted in two counts in the *post* in Rast. Ent. 248, which are the only precedents that I have found; and it seems to be proper and necessary in every case, when the action is brought by the alienor himself; as he cannot maintain the action until he is of full age. This *dictum* of Fitzherbert may perhaps have been founded on a misapprehension of the Rule in the Register, 228. In that page there is a writ by the alienor against his grantee; then a writ in the *per and cui*; and then one in the *post*; after which follows the rule, in these words; “*Ista clausula, ‘qui plenæ ætatis est ut dicitur,’ non dicatur nisi in primo Præcipe, ubi plura fuerint in uno brevi.*” On reading this rule hastily,

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it might perhaps be supposed that the words *in primo Præcipe*, referred to the *first* of the three writs immediately preceding; but these words are explained by those which follow; and the meaning of the rule seems to be, that when the demandant has several *præcipes* against different tenants, and only one writ (*d*), he shall insert the clause, *qui plene ætatis est*, in the first *præcipe*, and need not repeat it in the other *præcipes* in the same writ. It may be added, that this clause is inserted in the first of the three writs above mentioned in the Register, and the other two begin at the words, “in quæ idem T. non habet ingressum;” from which we should infer that all the preceding part of the writ, including the clause in question, was the same in the two last cases as in the first.

## SECTION II.

*Pleas in writs Dum fuit infra ætatem.*

It is of course a good plea to say, that the grantor was of full age at the time of the demise; as follows:

5. Plea, that  
he was of full  
age.

And the said T. comes and defends his right when, &c. and says that the said D. at the time of the demise aforesaid was of full age, and not under age, as the said D. has above in his writ and declaration aforesaid alleged; and of this he puts himself on the country (*e*).

It is not proper to say that he did not demise *whilst he was under age* (*f*); but, as it is added in the book cited, “he ought to say, that the said F. did not aliene, or that he was of full age at the time of the alienation.” These two last modes of pleading are stated as if they were both of the same effect; and perhaps it may be thought that in this action, as well as in the preceding, the general plea of *non dimisit* would put in issue the supposed

(*d*) See an example of this kind in the Register, 248. b. and Co. Lit. 139.

(*e*) Rast. 248. Fitz. Dum fuit infra ætatem, 1. 2. 4. Bro. Dum fuit infra ætatem, 2.

(*f*) 38 H. 6. 3.

defect in the demise set forth in the writ, as well as the question, whether such a demise has been made or not. But even if the plea in that form would be good, it is unnecessary when the defence is that the grantor was of full age; as this fact may be so easily traversed by itself, in the plea of which the form is given above.

It has been held a good bar, that the demandant gave the demanded premises in exchange for other lands, which he held on the day of the purchase of the writ; and the demandant was required to answer this allegation; which he did by replying, that when he arrived at full age he did not agree to the exchange, and that he was not seised of the said lands taken in exchange, on the day of the purchase of the writ (*g*). The latter part of this replication seems to be all that was necessary.

So it is said to be a good bar, that the infant made the gift, or lease, reserving a rent; and that after his full age he accepted the rent (*h*).

If an alienation is made by two joint-tenants, one of whom is under age, that one may bring this action for the whole, as if he alone had demised it; because if he had demanded only an undivided moiety, the tenant might have barred him, by pleading the grant of his co-tenant, under which the tenant, for aught that now appears, may lawfully hold one moiety. It is not therefore a good plea to such a writ to say, that he entered by the demandant and one C. The proper plea in such a case is in bar; to wit, that the demandant and C. were jointly seised in fee, and demised to the tenant, or to the person under whom he holds; wherefore as to the moiety belonging to C., he prays judgment if the said demandant his action, &c.: and as to the other moiety, he may plead that the demandant was of full age, or any other matter that is a good bar to him. It is not necessary to aver that C. was of full age at the time of the alienation; for if he were under age, his act is not void, and it is voidable only by himself or his heir. Neither is it necessary to aver that

(*g*) Fitz. Exchange, 3.

(*h*) Bro. Dum fuit infra æt. 8. 2 H. 6. 24.

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he is now alive; for if he were alive, he could not have joined in this action. The alienation by one joint-tenant is not the alienation of the other, and therefore they cannot join in an action on such alienations; but for a disseisin to two joint-tenants they may both join in an action (i). This seems to be the result of the several cases cited in the note; but according to the opinion of Littleton and Lord Coke, if two joint-tenants within age join in a feoffment, a joint right remains in them; so that the survivor may enter into the whole, or may recover the whole in a writ of right; although it is admitted that if he had brought a writ of *Dum fuit infra ætatem*, he should have recovered only a moiety (k).

In Fitz. *Dum fuit infra ætatem*, 7, the tenant pleaded that a former wife of the demandant was seised, and died without issue, and the land descended to the tenant, as her sister and heir; and so the demandant had nothing in the premises unless as husband, &c. This seemed to be considered a good plea; and the demandant replied that at the time of the demise he was seised in his own right in his demesne as of fee. This is substantially the same as the plea, that the supposed grantor was never seised in manner and form, &c., or that he had nothing in the premises but as husband of one A., without setting forth any title in the tenant. According to the rule in Co. Lit. 303, when special matter is pleaded, and the conclusion (*et sic*) is to the point of the writ or action, (as it seems to be in the present case) the special matter is waived.

(i) Fitz. *Dum fuit infra æt.* 1. 2. 4. Briefe, 831. 6 E. 3. 4. Bro. *Dum fuit infra æt.* 2. 21 E. 3. 50. F. N. B. 192.

(k) Co. Lit. 337. 8 Co. 85. Whittingham's case.

## CHAPTER XIII.

## SECTION I.

*Writ of Dum non fuit compos mentis.*

THIS writ is founded on an alienation made by one who is not of sound mind. It has never been doubted that such an alienation might be avoided by the heir of the alienor; and it was formerly understood that it might be avoided by the alienor himself, either by entry, or by this writ, *dum non fuit compos mentis sua*. The Register contains sundry writs of this kind, for the alienor (*a*); and this is ample evidence of what was the ancient law on this point. Fitzherbert (*b*) maintains the same doctrine; and Sir William Blackstone evidently concurs with him; although he admits that the contrary opinion has been handed down as law (*c*). Littleton on the other hand considers it as well settled, that the insane person himself cannot avoid his own feoffment, or other like conveyance, neither by entry, nor by this action (*d*); and in this opinion he is followed by Lord Coke (*e*). Beverly's case (*f*) is cited by Lord Coke as an authority to the same point; and in the report of that case it is said to have been resolved unanimously, that every deed, feoffment, or grant, made by one who is *non compos mentis*, is avoidable; but that it shall not be avoided by himself. This point does not seem to have been material in the determination of that case, which was a motion for a prohibition to the Court of Requests, on the ground that the

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(*a*) 228.

(*b*) F. N. B. 202. Bro. Dum fuit infra statem, &c. 3. 5. 9.

(*c*) 2 Bl. Com. 291.

(*d*) Sect. 406.

(*e*) Co. Lit. 247.

(*f*) 4 Co. Rep. 123.



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matter in question was not cognizable in that court; and the only authorities, on which the resolution appears to have been founded, are the opinion of Littleton, and the three cases in the Year Books, which are mentioned by Blackstone in the page before cited.

Lord Coke in his report of Beverly's case, says that it has been objected to the common law that the above rule is not so reasonable as that of the civil law on the same subject; by which latter, all the acts of an insane person, if done without his tutor or guardian, are utterly void. In defending the common law against this reproach, he maintains that such a feoffment may be avoided for the benefit of the alienor, and in his life time, although not by any plea or action by the alienor himself. After the man is found to be *non compos* upon an inquisition at the king's suit, the king is his guardian and has the custody of all his estate; and upon a *Scire Facias* against the alienee, the land is seised into the king's hands, and thereby the inheritance is revested in the alienor. The question therefore seems to be reduced to a matter of form merely; and Lord Coke in the same report mentions some cases where this remedy by *Sci. Fac.* cannot be applied, and in which therefore the party may *aver* his former insanity, or in some other way avoid his own acts; as in the case of avoiding the bar of a fine with proclamations, levied whilst he was *non compos*; or of avoiding his own alienation of a copyhold estate.

In this State it seems to have been generally understood that all conveyances and contracts, made by one who is *non compos*, may be avoided (*g*); although from the course of proceedings prescribed by our laws the conveyance cannot be avoided on a *Scire Facias* by the guardian. The inquisition, by which one is found to be *non compos*, is made, in virtue of an order from the Judge of Probate, by the Selectmen of the town in which the party lives (*h*). Upon such a return of the inquisition, the Judge of Probate is authorized to appoint a guardian;

(*g*) See the late case of *Mitchell & al. v. Kingman*, 5 Pick. Rep. — where this point is now settled.

(*h*) Stat. 1783, c. 39.

but this return is not conclusive against any strangers who claim under a conveyance, or other act done by the person supposed to be *non compos* (i). The provisions of this statute as to the powers and duties of the guardian, are substantially the same as those of the statute *de Prærogativa Regis*, 17 Ed. 2. c. 9, 10, which regulate the proceedings of the king in the like case. Under both statutes the guardian has the custody of the land, but he has not the freehold, and therefore cannot maintain any common action for it in his own name (k). He is to provide necessaries for the ward and his family, out of the income and profits of the estate, and at his death to restore the estate, real and personal, to his heirs, executors and administrators; and by our statute he is expressly required to restore it in like manner to the ward, upon his recovering the use of his reason. Lord Coke observes that the king cannot have the possession of the land, so as to receive the rents and profits, nor can he restore it, as required, to the heirs of the ward, unless the conveyance made by the ward can be avoided in his life time; and he mentions this among the reasons in support of his construction of that statute. The same remark applies to our statute; and it follows that the guardian cannot perform the duties required of him, unless he can avoid such a conveyance made by his ward. Unless therefore some better mode can be suggested for this purpose, we may justly infer that the guardian may maintain, in the name of his ward, the common law writ of *dum non fuit compos mentis*; and as it seems clear also, from the case of *Mitchell & al. v. Kingman*, before cited, that the same action would lie for the alienor himself, after being restored to the use of his reason, I have prepared a form which may be adapted to either case.

Summon T. to answer to D. of — Esquire, [who is not of sound mind, and who sues this action by C. his guardian duly appointed] in a plea of land wherein the said D. demands against the said T. such a messuage which he the said D., whilst he was not of sound mind, demised to the said T. as it is said: And where-

1. Count, by the alienor, or his guardian.

(i) 12 Mass. Rep. 488.

(k) See 12 Mass. Rep. 373.

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upon the said D. says that within thirty years now last past, he was seised of the said messuage with the appurtenances in his demesne as of fee, (or, in his demesne as of fee-tail and of right, that is to say, to him and the heirs male of his body issuing—or, in his demesne as of freehold and right, for the term of his life) taking the profits, &c. and which he the said D. afterwards, and whilst he was not of sound mind, demised to the said T. as aforesaid, and of which the said T. now deforceth him.

If the action is brought by the alienor, after he is restored to the use of his reason, the words enclosed in brackets, to wit, “who is not of sound mind, and who sues,” &c. will be omitted. The two counts are alike in all other respects.

The allegation of deforcement at the close is not inserted in the English forms. It is proposed here for the reason mentioned above; to wit, to introduce the *ad damnum* at the close of the writ.

If the action is brought by the heir of the alienor, the form may be as follows:

2. — by the  
heir of the  
alienor.

—wherein the said D. demands against the said T. such a piece of land, which he claims as his right and inheritance, and into which the said T. has no entry but by one F. the father of the said D. whose heir he is, who demised the same to the said T. whilst he the said F. was not of sound mind, as it is said: And whereupon the said D. says that within thirty years now last past, the said F. was seised, &c. taking the profits, &c. and from the said F. the right to the tenements aforesaid, with the appurtenances descended to the said D. who now demands the same as the only child and heir of the said F. and into which the said T. has no entry but by the said F. who, whilst he was not of sound mind, demised the same to him as aforesaid, and whereof the said T. now deforceth the said D.

The writ in the *per and cui* varies as usual:

3. — in the  
*per and cui*.

—into which the said T. has no entry but by one S. to whom the said D. (or, to whom one F. the father, &c.) whilst he was not of sound mind, demised the same, as it is said:

In the *post* :

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—into which the said T. has no entry but after the demise which the said D. (or, which one F. the father, &c.) whilst he was not of sound mind, thereof made to one S. as it is said. (*Adding at the close of the count the usual clause for writs in the post,*) “and whereof he complains that the said T. deforceth him.”

4. — in the  
post.

## SECTION II.

### *Pleas in writs of Dum non fuit compos mentis.*

The pleas which disprove the original title of the demandant, as that he was never seised, or that he had nothing in the premises, &c. would no doubt be allowed in this, as in the other like actions. So it is a good plea, that the demandant, or his ancestor did not demise; and this must be pleaded in bar, though it should falsify the entry (l). And in the case last cited it is said, that if the demise is alleged to have been made to a husband and wife, the proof of a demise to the husband alone will not maintain this issue for the demandant.

I do not find it laid down, that on the plea of *non dimisit modo et forma*, the tenant may prove that *the party did demise whilst he was of sound mind*, as in the like plea in *sine assensu parochiæ* (m); and even if this were allowable, it is unnecessary, as there is an appropriate plea for that purpose, alleging the sanity of the grantor at the time of the demise; as follows :

And the said T. comes and defends his right when, &c. and says that the said F. at the time of making the said demise in the declaration aforesaid mentioned, was of sound mind; and of this he puts himself on the country (n).

5. Plea, that  
the alienor  
was of sound  
mind.

There is in 8 E. 3. 54. (422.) (o), a case of this writ, *dum non fuit compos mentis*, on a demise by G. the mother of the demandant. The tenants plead that the

(l) Fitz. Briefe, 367. 18 E. 3. 41.

(m) Sup. Chap. XI. § 2.

(n) Rast. 249. a. and b.

(o) Fitz. Estoppel, 145, where this case is imperfectly stated.

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demandant formerly brought an Assise of novel disseisin against them, and that they pleaded in bar of the Assise, that G. the mother of the demandant by her deed, which was then produced, gave the tenements to the tenants in fee-tail, and bound herself and her heirs to warranty; to which the demandant then replied, that nothing passed by the deed; and the assise found that the tenements did pass; whereupon judgment was then rendered for the tenants; and the plea seems to conclude by way of rebutter, by force of the warranty of the demandant's ancestor. The demandant now replies, that his mother, G. was not of sound mind at the time of making that deed. The tenants in their rejoinder rely on the former judgment by way of estoppel to this replication; because the demandant, by pleading in the former suit that nothing passed by the deed, admitted that the deed was good in all other respects; and then, it being found that the tenements did pass by the deed, it followed that the deed was good in all points. It was then objected that the tenants' plea in this action was double, as relying on the warranty, and also on the former judgment. But it was well answered by *Herle*, "that the plea is not double; for the tenants plead the deed in bar; and allege, or contend, that by the record the deed is of such force, that the demandant shall not be received to avoid it." This question, as to the duplicity of the plea, would have been obviated by pleading the deed with warranty, by way of rebutter, saying nothing of the judgment; and then, when the demandant replied that his ancestor was insane, the tenants might have estopped him by rejoining the former judgment. This seems to have been the effect of the pleadings, as understood by *Herle*.

It seems also that the tenants might have pleaded the former verdict and judgment in bar, averring the identity of the two demises, and relying on the estoppel, without saying any thing of the warranty. It is true that the Assise of novel disseisin is not of so high a nature as this action on the seisin of an ancestor (*p*); but this would

(*p*) See 6 Co. 7, *Ferrer's case*.

not be pleaded (in the case supposed) as a former judgment for the same thing, or for the same cause of action. The plea, as above proposed, would be founded on the principles so ably enforced and illustrated by Lord Ellenborough, in the case of *Outram v. Morewood & ux*, 3 East, 346; the result of which is, that a verdict on any precise point once put in issue shall forever conclude the parties to that issue. The former record, in the case supposed, would estop the demandant, not because the tenants had judgment in that Assise; but because that record proved conclusively that the deed in question was valid and effectual to bind the demandant; which it would not have been if his ancestor had been of non-sane memory at the time of executing the deed. "It is not *the recovery*, but *the matter alleged* by the party, and *upon which the recovery proceeds*, which creates the estoppel" (q).

(q) 3 East, 346. And see the cases there cited.

## CHAPTER XIV.

## SECTION I.

*Writ of Right.*

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THIS action, which is the highest that can be maintained in any case of ouster of the freehold, and the judgment in which is final and conclusive as to the right of property in lands, is in our practice one of the most simple of the real actions, both as it respects the process, and the pleadings. The form of the writ is prescribed by our statute (a), and is the same as in all the other common actions; and the process is as short as that in an action of debt or assumpsit. If the tenant, after having been duly summoned, makes default, whether at the first, or at any subsequent term, "the charge in the declaration is taken and deemed to be true;" and judgment is rendered accordingly, without any further process against him; and if an issue is joined, it is tried by a common jury, in the usual manner. The count also is as short and simple as in the most common writs of entry. The pleas to the writ are in general like those in other real actions; but as to the merits of the action, there is scarcely any matter of defence which may not be shown under the general issue.

This action will not lie for any estate less than a fee-simple.

The writ and count on the demandant's own seisin may be as follows:

(a) Stat. 1784, c. 28.

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1. Count, on the demandant's own seisin.

Summon T. to answer to D. in a plea of land wherein the said D. demands against the said T. a certain piece of land with the appurtenances situate in F. in the said county of M. containing one hundred acres, and bounded, &c. which he claims as his right and inheritance, by our writ of right. Whereupon the said D. saith, that within thirty years now last past he was seised of the said piece of land with the appurtenances in his demesne as of fee and right, taking the profits thereof to the value of fifty dollars by the year; and whereof he complains that the said T. unjustly deforceth him: to the damage, &c.

The allegation of deforcement is contained in the English *writ*, but not in the *count*. The clause, as introduced in the preceding form, may be considered as part either of the writ, or count. It cannot, in either view, vitiate the count; and it serves to introduce the *ad damnum*, which follows, according to the form of the writ prescribed by our statute. The concluding words of the count in the English books, "and that such is his right, he offers suit and good proof," would not comport with our forms, and are wholly unnecessary.

It will be observed that this count very much resembles that in the writ of entry in the nature of an assize. The only material difference is, that this does not set forth the manner of the tenant's entry, or the origin of his supposed defective title; but it is left to him to show any title that he may have; the demandant undertaking to show a better and greater right in himself.

For a form of the writ on the seisin of an ancestor, I propose the following case. John Stiles was the person last seised. He died without issue; and was the only child of Francis Stiles; who was the only child of George Stiles. George had only one brother, Benjamin Stiles; who had only one son, Samuel Stiles. Samuel had two daughters, Deborah and Elizabeth. Elizabeth died, leaving Catharine her only child, who is married to Henry



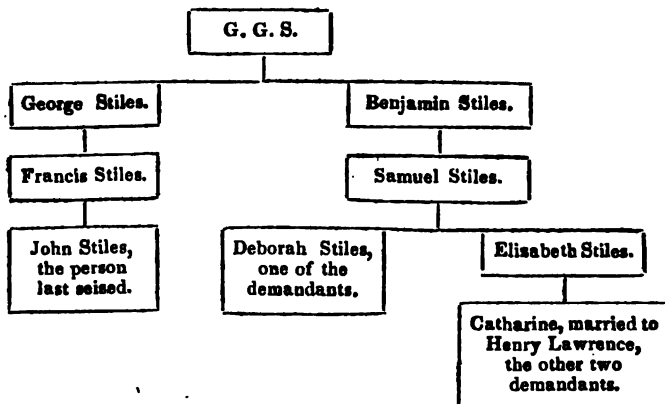
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Lawrence. Deborah Stiles, and Henry Lawrence and Catharine his wife, are the demandants (b).

2. Count, on  
the seisin of an  
ancestor.

Summon T. to answer to Deborah Stiles and Henry Lawrence and Catharine his wife in a plea of land, wherein they demand against the said T. a certain messuage with the appurtenances situate, &c. bounded, &c. which they claim as the right and inheritance of the said Deborah and Catharine by our writ of right. Whereupon the said D. H. and C. say that within forty years (c) last past one John Stiles, the cousin of the said Deborah and Catharine, whose heirs they are, was seised of the tenements aforesaid with the appurtenances in his demesne as of fee and right, taking the profits thereof to the value, &c. and from the said John Stiles, for that he died without issue of his body, the right to the said tenements with the appurtenances descended to the said Deborah Stiles and one Elizabeth Stiles as cousins and co-heirs of the said John Stiles, that is to say, as daughters and co-heirs of one Samuel S. who was the only son and heir of one Benjamin S. who was the only brother of one George S. who was the father of one Francis S. who was the father of the said John Stiles; and from the said Elizabeth S. the right to her share (or, part) of the said tenements with the appurtenances descended to the said Catharine as her only child and heir; and the said Catharine afterwards

(b) This case may be better understood from the following table of the pedigree.



(c) This is now the limitation of a writ of right, by stat. 1807, c. 75.

took to her husband (*or*, was lawfully married to) the said Henry Lawrence; and whereof the said Deborah, Henry and Catharine, complain that the said T. unjustly deforceth them.

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A descent may be stated immediately from a brother to a brother, without naming their father; but if to any more remote relation, as to an uncle or nephew, the intermediate ancestors must be named, so as to show *how* the party is uncle or nephew. As for example, in the preceding case, Samuel is the nephew of George; but if he had been merely called nephew, without stating *how*, (to wit, as the son of Benjamin, who was the brother of George) the count would be adjudged bad on demurrer (*d*). So also a descent is often traced through one, who was not the heir of his immediate predecessor in the genealogy; as for example in the above case, from George to his brother Benjamin. As George had a son, Francis, who survived him, his brother Benjamin could not have been his heir. So if Francis had died in the life time of George, and John had survived his grandfather, John would have been heir to George. If therefore in the preceding count the descent had been traced through Benjamin, as the brother *and* heir of George, it would have been erroneous (*e*). It is true that it does not necessarily appear from the above count that Benjamin could not have been the heir of George; because, for aught that is there stated, George might have survived his son and grandson, in which case his brother Benjamin, if then living, would have been his heir; but as by the case supposed the fact is otherwise, the tenant might have pleaded this as a mistake of the descent (*f*).

The seisin alleged in the count, whether in the demandant or his ancestor, must be an actual seisin, by taking the profits, and not a mere seisin in law (*g*). A

(*d*) 3 Bos. & Pul. 453.

(*e*) 2 Bos. & Pul. 570. See 2 Chit. on Plead. 213, and the books cited in the note there.

(*f*) See sup. Ch. III. § 16, and *infra*, § 2.

(*g*) 1 H. Black. 1. Vin. Droit, C. and the books there cited.

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mere *right to enter*, as of an heir upon the death of his ancestor, or of a devisee upon the death of the deviser, or a disseisee as against the disseisor; or a *title of entry*, as for a forfeiture, or for breach of a condition, are not sufficient (*h*).

But although it is necessary to allege this seisin to have been "in his demesne as of fee *and right*," and the omission of the word *right* would be fatal on a writ of error (*i*); yet a seisin acquired by wrong, and afterwards defeated by one who was entitled to the possession, is held to be sufficient against a stranger, when the demandant is in other respects entitled to maintain the action against the stranger. As if A. be tenant for life, remainder to B. in fee; and B. enters on the tenant for life and disseises him; the seisin thus tortiously acquired by B. will enable him to maintain a writ of right against any stranger who may be in possession after the determination of A's estate; even though A. should have re-entered on B. Such a re-entry would defeat the seisin of B. as between him and A.; but not as it regards the stranger. So if A. be tenant in tail, remainder to B. in fee; A. dies without issue, but leaving his wife *privement enseint*; B. enters, and afterwards the issue is born, and enters on B., and dies without issue; this seisin of B. is sufficient to maintain a writ of right, though it was on a title which proved defective, and which was afterwards defeated (*k*).

The parson of a parish in England cannot maintain this writ of Right. He is allowed to maintain several actions which are generally considered appropriate to a tenant in fee; but he has not the fee-simple. This is in abeyance; and to many purposes he has in effect but an estate for life (*l*). His highest remedy for recovering glebe lands is the writ of *Juris utrum*; which is sometimes called the Parson's writ of right. This is a writ, in nature of an Assise, commanding the sheriff to summon a jury, to ap-

(*h*) See Plowd. 88. 484. 4 Co. 9. Bro. Droit, 25.

(*i*) 2 Bos. & Pul. 570. 5 East, 272.

(*k*) Co. Lit. 280, 281.

(*l*) Co. Lit. 341, 342.

pear at such a court, "ready by oath to recognise, whether (*utrum*) such a messuage with the appurtenances in E. be *frankalmoign* belonging to the church of him the said D. (the demandant) or the *lay fee* of T. of — and in the mean time let them view that messuage, &c. and summon by good summoners the said T. who holds the said messuage, that he be then there to hear that recognition," &c. (m) This writ lies for the Parson, upon an alienation by his predecessor, or a recovery against him by default, &c. or upon a disseisin of his predecessor, or an intrusion after his death. But the Minister of a Parish in this State, by force of our statute for pious and charitable uses, (stat. 1785, c. 51,) is seised in fee, in right of his Parish, of all parsonage lands, like a Bishop, or Dean, in England; and like them he may maintain a writ of right. The writ will lie on his own seisin within thirty years; and on the seisin of his predecessor within forty years. The count will be readily framed by reference to the two preceding forms, and to the counts, No. 2. and 18. in entry on disseisin, sup. Chap. II.

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On the seisin of his predecessor, it might be as follows :

Summon T. to answer to D. of — Clerk, and Minister of the second Parish in the said town of B. in a plea of land, wherein the said D. demands against the said T. a certain messuage, &c. which he claims as the right of the said Parish, by our writ of Right: Whereupon the said D. says that within forty years now last past one A. B. formerly minister of the said Parish was seised of the messuage aforesaid with the appurtenances in his demesne as of fee, in right of the said Parish, taking the profits thereof to the value, &c.; and afterwards the said A. B. died; after which he the said D. was duly and legally appointed and settled as the minister of the same Parish, and thereupon became and still is the lawful successor of the said A. B. therein: and of which said messuage with the appurtenances the said D. complains that the said T. unjustly deforces him.

3. Count by the Minister of a Parish, on the seisin of his predecessor.

A writ of right may be maintained by any one who has the right of property in fee-simple, although he has also

(m) F. N. B. 49. Reg. 32. 3 Black. Com. 252.

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the right of possession, and even a right of entry ; and he may sometimes find it better to resort at once to this action, the judgment in which is final and conclusive, than to adopt either of the other remedies. But he may on the other hand fail in this action, when he might have recovered in a writ of entry, and even when he might have lawfully ousted his adversary by an entry *in pais*, and have held the land forever against him. Littleton, § 478, states a case of that kind, to which Lord Coke has added some others. These however are not so likely to occur as a mistake of the opposite kind ; that is, an entry by one who has the right of property or of possession, but whose right of entry is tolled. Suppose for example that A. had disseised me nearly thirty years ago, and I now enter upon him and oust him ; he may re-enter, or may recover the land against me in a writ of entry ; and if he will delay his entry or action until after the expiration of thirty years from the time when I was disseised, he will hold the land forever against me ; as I cannot maintain either a writ of entry, or a writ of right, on my own seisin, after the expiration of thirty years. And here it may be observed, according to the doctrine above stated from Co. Lit. 280, that the seisin acquired by my tortious entry on A., though it might avail me to some purposes, is wholly defeated as between me and A. by his re-entry, or recovery against me. In the case here supposed, I might have recovered the land in a writ of entry or writ of right against A. ; but by pursuing my remedy by entry, when my right of entry was barred, I expose myself to the danger of losing the land forever ; and if I should live beyond forty years after the original disseisin to me, my heirs also would be wholly without remedy. This same case will also furnish an illustration of the consequence of the mistake first mentioned, that is, of adopting a higher remedy than the case requires or allows. Suppose for example that A., after my entry upon him in the manner above stated, had brought a writ of right against me, instead of entering, or bringing a writ of entry ; it is clear from the opinions of Littleton and Coke, in the place above cited, that A. would have failed in his action, and I

should have had a judgment which would be final and conclusive against him.

But although this action will lie concurrently with a writ of entry, yet it is not necessary, unless when the inferior action is barred, either by a former judgment in a writ of entry, or by lapse of time. As it lies after a judgment in a writ of entry, it is said to be of a *higher nature*; and Lord Coke (*n*) speaks of it, as if the matter decided in the former action should be tried and determined again in the writ of right. This language may tend to lead the student into the belief that the *same title*, or question of right, which was the subject of the former trial and judgment, is to be tried in the second action: but this is not true (*o*). The writ of entry, if founded on the demandant's own seisin, is intended to try only his right of possession; and if the tenant, or the person under whom he holds, had a right of entry on the demandant, the latter must fail in the action, although he had the undisputed right of property. So, if the action is founded on the seisin of an ancestor, the demandant may fail in proving a lawful seisin or right of possession in his ancestor, although he has the right of property, and might have recovered in a writ of right. Suppose for example that my ancestor was disseised, and I enter after my right of entry is tolled, and then bring a writ of entry on my seisin, thus wrongfully acquired. It is manifest that the verdict against me in that action will show only that I was not lawfully seised, having entered when I had no right of entry; and will by no means prove that I had not the right of property in the land. So in the same case, if the adverse party had brought his writ of entry against me for that disseisin, and had recovered a verdict and judgment, it would prove only that I had lost the right of entry; but would not conclude me as to right of possession or of property. I might therefore, after judgment in either of these two cases, bring a writ of entry on

(*n*) 6 Rep. 7, Ferrer's case. 5 Co. 33, Robinson's case.

(*o*) See the argument of Lord Ellenborough, C. J. in *Outram v. Morewood and ux*, 3 East's R. 346, and the cases there cited.

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the seisin of my ancestor, and the former judgment would be no bar to me. So if in the writ on the seisin of my ancestor I should be unable to prove his seisin within the thirty years prescribed by our statute, or if from any other cause I could not establish my present right of possession, I might afterwards bring a writ of right, and undertake to prove my right of property, and the seisin of my ancestor within forty years; and this would not be repugnant to any thing decided in the two former actions, nor would it be a trial and determination of the *same matter* again.

The true principle is, that when the same evidence is required to support two different actions, a judgment in one of them will be a bar to the other (*p*). Thus a judgment in assumpsit would be a bar to an action of debt on simple contract for the same debt; but if in assumpsit for money lent, it should appear that the plaintiff had taken a bond for the amount, the judgment against him in the action of assumpsit would not prevent his maintaining an action of debt on the bond. So if a man is barred in an action of Formedon *in descender*, he may have a Formedon *in reverter*, or *in remainder*; not because the latter are of a higher nature, but because they are founded on titles totally different from the first. In the Formedon *in descender* he counts as heir of the donee; in the reverter he counts as donor, or heir of the donor; and in remainder, as one to whom the land was limited after the determination of the preceding estate.

The writ of right is indeed of a higher nature than the others, because the judgment upon it includes all that is involved in the other actions, and settles definitively, the whole right to the land, *of possession* as well as *of property* (*q*); but it is of a *different*, as well as of a *higher nature*; and may therefore be maintained by either party after a judgment in any of the other actions, without vio-

(*p*) 3 Wils. 304. 2 Blacks. 627.

(*q*) Bract. 328.—*Placitum per breve de recto utrumque jus, tam possessionis quam proprietatis—comprehendit.*

lating that principle of the common law, which forbids a second action between the same parties, for the same cause of action (r).

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## SECTION II.

*Pleas in the Writ of Right.*

The pleas in abatement in this action are substantially the same as in the writs of entry ; with the exception of a few which from their nature are not applicable to this writ. Thus in the writ of right there is no statement of a demise, nor of the manner of the tenant's entry ; and of course there cannot be any plea of a mistake in either of those particulars. It seems doubtful also whether *darrein seisin* is a good plea in this action. Comyns says that it is no plea in a writ of right (s) ; but the two cases which he cites for this opinion would hardly be thought sufficient without the aid of his own authority. One of them, 5 Ass. pl. 1, is in very ambiguous language ; and in the other, 11 H. 7. 3, the opinion was advanced in argument, and the Reporter says that "the justices were in divers opinions upon it." Fitzherbert also (t), who abridges the case from 5 Ass. 1, makes a slight change in the language, which leaves it open to the construction, that *darrein seisin without title* might be pleaded *in abatement* to a writ of right, as well as to a writ of entry ; and that, *with title* it was a bar to all, except to the writ of right (u).

There is a good reason why this latter plea should not be allowed in a writ of right, which is, that the same facts would be proper evidence for the tenant under the

(r) See *supra*, Chap. XIII. § 2.

(s) Tit. Abatement, H. 25, and see *supra*, Chap. III. § 14.

(t) Mortdancestor, 22. "And so note that *darrein seisin* alleged without title is to the writ, and with title it is in bar of assise, and bar of every action whatsoever, unless in writ of right." See Bro. Droit, 49. S. C. and Hughes, Com. on original writs, 85.

(u) See F. N. B. 212. F. note a.



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general issue, and if proved would entitle him to a verdict. So, as to the same matter when pleaded without title, in abatement of the writ, there is a reason why it should be allowed in writs of entry, which does not apply to writs of right; and which of course tends to confirm the opinion expressed by Comyns. The writ of entry, in showing the origin of the wrongful or defective title of the tenant, must of course show how the tenant, or the person under whom he holds, acquired the possession from the person who last held the estate claimed by the demandant. It follows that the seisin alleged on the part of the demandant, (whether in himself, or in his ancestor, or predecessor) is not only the foundation of the demandant's title, but is necessarily connected with the entry on the part of the tenant, which is set forth in the writ; and a mistake in the former of these particulars involves a mistake in the latter, and shows that the action is misconceived. Suppose for example that I declare on a disseisin committed to my grandfather, when in truth my father had afterwards re-entered, and been seised of *the same estate*, it is clear that the tenant cannot now hold under that former disseisin, and of course my writ ought to be founded on the subsequent seisin of my father, showing in what manner he was ousted by the tenant, or by the person under whom the tenant claims. It is necessary in this case that the father should be seised of *the same estate* which was in the grandfather, and which the demandant now claims; for if the father had lost his right of entry, or from any cause was not remitted to the former estate, his subsequent seisin of the land would not I apprehend avoid the former disseisin; and the son, if not estopped or barred by some other cause, might resort back to the lawful title of his grandfather, and recover upon that (x). But in the writ of right there is no mention of a tortious entry, or other defective origin of the tenant's title. The seisin of the demandant's ancestor is stated merely as the foundation of his title; and if he alleges, and can prove, such a

(x) 5 Ass. 1. Fitz. Mortdancestor, 22. 1 Ld. Raym. 481.

seisin in his grandfather, within the period of limitation, it would not impair his right, nor affect his action, if it should appear that his father also was seised after the death of his grandfather. As he does not allege that his grandfather was disseised, or otherwise lost the possession, this proof of a later seisin in his father does not contradict any thing that he has alleged, or that he is required to prove. The mistake, therefore, if it can be called a mistake, in a writ of right, of alleging the seisin of an ancestor more remote than the one who was last seised, may be injurious to the demandant, by requiring him to prove a seisin of a time more ancient than would have been necessary; but it never can be injurious to the tenant.

If indeed the demandant himself had been seised, his writ of right on his own seisin would be limited to thirty years; and he might sometimes avoid the bar of the Statute of Limitations, if he were permitted to count on the seisin of an ancestor within forty years. This therefore is a case in which the tenant would find a material advantage from being allowed to plead this *darrein seisin* in the demandant. But this circumstance could not have had any influence in establishing the law in this particular; because in the times when the pleadings in this action were settled, there was no such limitation, and of course no danger of any such injury or inconvenience to the tenant from being deprived of the plea.

This plea, if necessary, or allowable, in a writ of right, will be like that in a writ of entry; (*supra*, Chap. III. pl. 22.) excepting only the *defence* in the beginning of the plea. Pleas in abatement to writs of entry begin in the same manner as pleas in bar; and I presume the same rule would apply in writs of right. In Brown's Ent. 340, there is a plea, in which the tenant makes the *full defence* appropriate to a writ of right; and then as to parcel of the premises he pleads non-tenure, and as to the residue joins the mise on the mere right. It is true that in the following case, where the tenant pleads non-tenure as to the whole of the premises, the defence is not like that in a writ of right, but is the same as in a writ of en-

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try; that is, the tenant "comes and defends *his right when*, &c. and says that he cannot render," &c. But in this second case, all the other proceedings, including the judgment, are in the forms that are usual in writs of entry; and seem to have been copied from some writ of that kind, without adverting to the distinction between that, and a writ of right. The case first cited from Brown's Entries seems at least to prove, that there is nothing repugnant or inconsistent in pleading in abatement after making full defence (*y*); and the plea would therefore probably be allowed, if not required, to be in that form. Whatever is the proper form as to this plea of non-tenure, will be proper also in all the other pleas in abatement that are applicable to this writ. I have not met with any precedent of a plea in abatement to a writ of right, excepting the two above cited from Brown's Entries.

As to pleas in bar, it has been said that there is no special plea to a writ of right, except that of a collateral warranty; and that every other matter of defence may be shown in evidence, when the mise is joined on the mere right (*z*). This rule is laid down too broadly. There are some matters which the tenant was always required to plead specially; and some others which he was permitted either to plead, or to give in evidence under the general issue, at his option. Thus, if the demandant or his ancestor had granted the premises to the tenant, either in tail, for life, or for years, the latter could not join the mise on the mere right, but must plead the conveyance in bar (*a*). So in the same case it is said that bastardy must be specially pleaded; and it is added, that "there are many other issues, without joining the mise." So a release by the demandant or his ancestor, might be pleaded, or given in evidence (*b*); and on pleading a fine, it seems that the tenant might either conclude in bar; or might conclude that "so he has the greater right," &c. and put

(*y*) See 39 E. 3. 20.

(*z*) Bro. Droit, 48.

(*a*) Fitz. Droit, 41.

(*b*) Bro. Droit, 43. Fitz. Droit, 21. 27 E. 3. 85. But see Fitz. Droit, 46.

himself on the grand assise (c). There are also matters which go, not to the *gist* of the action, but to the *discharge* of it, as the resignation, or deprivation, of the demandant, claiming as a sole corporation; and also, objections to the action of the writ, as a mistake of the descent (d), which must always have been pleaded specially. If an issue was joined on any of those special pleas, it was triable by a common jury; and they were therefore sometimes resorted to for the sake of avoiding the inconvenience of a trial by the grand assise (e). But this motive cannot operate here, because in our practice all issues in this action are tried by a common jury.

There is also another material point, which is not put in issue by joining the mise on the mere right; to wit, the seisin of the demandant, or his ancestor, as alleged in the count. When it is intended to put this in issue, the tenant, after joining the mise in the usual form, must also pray an inquiry as to the seisin; and if this be not done, the fact, I apprehend, is virtually confessed, and the tenant cannot object on the trial, that the demandant, or his ancestor, had not been seised within the period of limitation prescribed by the statute (f). It is, I presume, from inattention to this part of the tenant's plea, and the effect of it on the trial, that some confusion has arisen as to the manner of conducting the trial in this action. When the mise is joined on the mere right, without any prayer to inquire of the seisin, the tenant has the affirmative on the trial (g). The seisin stated in the writ, and admitted by the plea, is *prima facie* a good and sufficient title for the demandant (h). The tenant, therefore, in this case, begins by giving his evidence first on the trial; because if he cannot show a right of property, the title of the demandant, arising from the seisin stated in the writ, must

(c) Fitz. Droit, 14. 29. 31.

(d) See Fitz. Droit, 47.

(e) 2 Saund. 44. n. 4. 3 Chit. Plead. 652.

(f) See Fitz. Droit, 6. Bro. Droit, 32. 10 E. 3. 20. (502.) 10 E. 4. 9.

(g) 3 Leon. 162, Heidon, v. Ibgrave. Golds. 23. S. C.

(h) See Fitz. Droit, 20. 27 E. 3. 9. (85.)

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prevail. But when the seisin is put in issue, it is obvious that the demandant has the affirmative on that point; and if he cannot prove the seisin within the time of limitation, he will fail in the action, whatever may be his title in other respects. If the jury do not find the seisin as alleged, they will not inquire of the right, but will find a verdict for the tenant (*i*). It would therefore be absurd to require the tenant to begin by showing his right, when, from the pleadings, the demandant was to be required first to prove the seisin as alleged in his count; without which proof he would not be entitled to question the tenant's right, nor to recover the land, whether the tenant could show any right to it or not. It was accordingly decided by Mr. Justice Heath, in the year 1800, that when the seisin was put in issue, the demandant should begin with his evidence (*k*); and although the propriety of this course seems to have been questioned by Mr. Serjeant Williams, yet the same rule was adopted by Baron Wood, in the year 1817, as reported in 1 Holt, N. P. Rep. 657 (*l*).

In this case, as also in *Andrews v. Lord Cromwell, Moore, 762*, the tenant was allowed to tender the demy-mark and to pray an inquiry as to the seisin, after the term in which he had joined the mise; and it was considered that he might do it at any time before the Assise were sworn. But in the case in *Moore*, although the Judges allowed it at the appearance of the jury, yet they said it ought to be done at the time of joining the mise. This

(*i*) Co. Lit. 293.

(*k*) 2 Saund. 45, f. note.

(*l*) It seems improper to cite this case, without remarking on the inaccuracies and mistakes with which it abounds. Among other things it is stated, that the Assise were first sworn to try the issue on the seisin, on which they returned a verdict for the demandant; and that they were then sworn again to try the question of right, and returned a second verdict. This must undoubtedly be a mistake of the Reporter. It is obvious from the statement of the trial in *Littleton*, § 514, that the Assise were sworn but once; and that, after the whole evidence had been introduced, they were charged to inquire first of the seisin, and if they found that the ancestor was seised, then they were to inquire as to the right.

latter is unquestionably the most proper course, and seems evidently to have been adopted in the case above cited from Littleton. This prayer for an inquiry of the seisin is in effect a material part of the tenant's plea, and a distinct ground of defence, of which the demandant ought to be seasonably apprized. If it should be allowed to be introduced after the other part of the plea or defence, for which there seems to be no reason whatever, there can be no doubt that the courts would allow the demandant a continuance, or such other delay as should be necessary to enable him to prepare his evidence on that point.

It may be further observed that although the demandant has the affirmative as to the seisin, when that is put in issue, yet if he proves that fact, the burthen is shifted, and the tenant must prove a greater right to the land.

But although the seisin alleged in the count is thus material, and may be put in issue, yet it seems to be improper and unnecessary to deny it in a distinct plea, by a traverse in the common form (*m*). The fact is put in issue by subjoining a prayer, that the Assise, or jury, may inquire whether the person named, was so seised. As the tenant, in the first part of his plea, did not directly assert his better right to the land, but only *prayed an inquiry* to be made respecting it; it was natural, when adding the other point, that it should be put in issue in the like form. It was said indeed, in a case in 35 E. 3, stated by Fitzh. Droit, 30, that it was a good plea in a writ of right, to say, that he, on whose seisin the demandant counted, was never seised; and if it be found that he was seised, that the tenant has better right, &c. But it is evident that in the case there spoken of there was only one plea; and even if such a plea were good in point of form, it would have only the same effect as the other mode of putting the seisin in issue; that is, the assise must first inquire of the seisin, and if that be found for the demandant, they must then inquire which party has

(*m*) 2 Wheat. R. 306. But see Bro. Droit, 32, the opinion of Brooke, that after the Statute of Limitations, 32 Hen. 8. c. 2, an issue might be tendered on the seisin.

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the greater right (*n*). There being therefore a well settled mode of putting in issue the seisin alleged in the count, in the same plea in which the right is put in issue, there is certainly no necessity for traversing it in a distinct plea (*o*).

In the case of *Tissen v. Clarke*, 3 Wils. 419. 541; the mise was joined on the mere right, without any denial of the seisin; but this circumstance seems to have passed unnoticed. The tenant indeed was understood to have the affirmative to maintain, and he accordingly began in the giving of evidence; but he undertook among other things to disprove the seisin of the demandant's ancestor within sixty years, by proving a seisin in others. And Lord Chief Justice De Grey, in his instructions to the jury, seems to have taken it for granted that if the tenant had proved a seisin for sixty years in himself and those under whom he claimed, he would be entitled to a verdict under that issue. But even if the law be so, and if the tenant is not concluded in such a case by the tacit confession of the seisin declared on, still he should never omit to pray an inquiry as to the seisin, when he places any reliance on that point. For, even if the question is open to him, on the general plea on the mere right, still by omitting the other part of the plea, he takes the affirmative on this point, and must fail in it unless he *disproves* the seisin alleged; whereas, by putting it in issue in the

(*n*) Co. Lit. 293.

(*o*) There is also in 3 Chit. Plead. 654, a plea denying the seisin of demandant's ancestor, which is copied from 10 Wentw. Plead. 220. The plea begins by *defending* the seisin of the *demandant*, and then traverses the seisin of the *demandant's ancestor*. Wentworth, in the notes subjoined to this plea, confounds the action of *assise of novel disseisin*, with the *grand assise*, or jury, who try the issue in the writ of right; and he talks of giving "extracts from the statutes and law-books concerning an assise of novel disseisin at common law, grounded on the king's writ of right." He gives no authority, and not even the name of any barrister, for the above mentioned plea; and it certainly can derive no authority from his book; especially when coupled with the numerous absurdities on the subject of this action, which are found in the same page.

manner before mentioned, he throws the burthen of proof on the demandant.

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The joining the mise on the right, with the prayer of an inquiry as to the seisin, in the English practice, is as follows :

And the said T. comes and defends the right of the said D. and his seisin, (or, and the seisin of the said F. (*the ancestor*) when, &c. and all, &c. and whatsoever, &c. and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, &c. and puts himself on the grand assise of the lord the king ; and prays recognition to be made, whether he himself hath greater right to hold the tenements aforesaid with the appurtenances to him and his heirs as tenants thereof, as he now holdeth them, or the said D. to have the said tenements with the appurtenances as he above demandeth them. And he tenders here in court six shillings and eight pence to the use of the lord the now king, &c. for that, to wit, it may be inquired of the time of the seisin alleged by the said D. : and he therefore prays, that it may be inquired by the assise, whether the said D. (or, the said F.) was seised of the tenements aforesaid with the appurtenances in his demesne as of fee in the time of the said lord the king George the second, as the said D. in his demand before hath alleged (*p*).

4. Plea, joining the mise on the right, and praying inquiry of the seisin.

There are several expressions in this plea which are without any effect or meaning in our practice, or are wholly incongruous to it, and which are not necessary to characterize the plea. I see no objection to omitting all the formal words which follow the "*when*," &c. and considering them, if necessary at all, as included or represented in that *et-cætera*. I would therefore propose the following form :

And the said T. comes and defends the right of the said D. and his seisin, (or, and the seisin of the said F.) when, &c. and puts himself upon the country ; and prays recognition to be made, whether he the said T. hath greater right to hold the tenements aforesaid with the appurtenances to him and his heirs as tenant thereof, as he now holdeth them, or the said D. to have the said tenements with the appurtenances as he above demandeth them :

5. *Aliter*.

(*p*) 3 Bla. Com. Appendix No. 1. Rast. 246, 247. See also Fitz. Droit, 10.



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And the said T. also prays that it may be inquired by the jury, whether the said D. (*or*, the said F.) was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, within thirty (*or*, forty) years next before the commencement of this action, as the said D. has above in his said count alleged.

There is no necessity for a joining of the issue by the demandant, nor for any replication or answer whatever to this plea.

The tenant, if he has an estate for life only, may pray in aid of him in reversion or in remainder; and the proceedings and entries will be like those in aid-prayer in writs of entry (*q*). The plea, when the prayee in aid joins in the defence, will be varied as follows:

6. Plea, after  
joinder in aid.

And now here at this day come as well the said D. as the said T. and the said P. (*the reversioner*) also comes, and freely joins himself to the said T. in aid against the said D. in the plea aforesaid; and thereupon the said T. and P. defend the right of the said D. and his seisin, when, &c. and put themselves upon the country; and pray recognition to be made whether the said T. hath greater right to hold the said tenements with the appurtenances for the term of his life, as he now holdeth the same, the reversion thereof after the death of the said T. to him the said P. and his heirs belonging in manner aforesaid, or the said D. to have the said tenements with the appurtenances as he above demandeth them: And the said T. and P. also pray that it may be inquired, &c.

If the reversioner or remainder-man does not come in and join in the defence, the tenant for life may plead alone; and his plea would be like No. 5, *supra*, except in the statement or description of his own estate, which would be as follows:

7. Plea, by  
tenant for life.

— and prays recognition to be made whether he the said T. hath greater right to hold the said tenements with the appurtenances for the term of his life, as he now holdeth them, the reversion thereof, after the death of the said T. to the said P. and his heirs belonging, or the said D. to have, &c. (*r*)

(*q*) See *supra*, Chap. IV. § 8.

(*r*) Bro. Droit, 15. 39. 53. Fitz. Droit, 3. 9 E. 4. 35. a.

I have not met with any precedent in the books of entries, of the *Receipt* of the reversioner or remainderman in this action. The entries and pleadings, if wanted, may be easily made by reference to those in the writ of entry, *supra*, Chap. IV. § 8, and to the above plea by the prayee in aid (*s*). If indeed the tenant had previously joined the mise on the mere right, and thereby forfeited his estate, the tenant by receipt would not in his plea maintain the right of the original tenant; but ought, I presume, to pray recognition to be made, "whether he (the party received) hath greater right to hold the tenements to him and his heirs, as tenant thereof by the receipt aforesaid, as he now holdeth the same, or the said demandant to have the said tenements," &c. So if the estate of the tenant for life is determined pending the writ by forfeiture for any other cause, or by surrender, he who had the reversion may be received (*t*); in which cases it is clear that he cannot assert the present right of the original tenant, but must be permitted to maintain his own exclusive right.

If a mistake in tracing the descent (*u*) is apparent on the face of the count, the tenant may take advantage of it on special demurrer; and I presume, in some cases, on a general demurrer, or even on a writ of error. When the mistake is of such a kind as to show that the demandant could not have been the heir of the person last seised, it would not be cured even by a verdict. But when the descent is defectively stated, though still such as is consistent with a title in the demandant, as alleging a descent from an uncle to a nephew, without naming the father of the nephew, the tenant would perhaps be required to demur specially (*x*). And when the mistake consists in omitting a collateral ancestor, through whom the right descended, and this is not apparent on inspection of the

(*s*) See Fitz. Droit, 11.

(*t*) 2 Inst. 346. Bro. Receipt, 112. 18 E. 4. 25. Keilw. 70.

(*u*) See *supra*, Chap. III. § 15. Bro. Omission, *per totum*, 2 Bos. & Pul. 570. 3 Bos. & Pul. 453. 4 Bos. & Pul. 64.

(*x*) 3 Bos. & Pul. 453.

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count, the tenant must plead it specially. As in the case in Fitz. Entre, 70, where the descent is deduced from J. to R., as his uncle and heir, (to wit, as the brother of F. who was the father of J.) if R. had had an elder brother who survived J., the tenant must plead that fact; because the right *might* have descended immediately from J. to R.; and it *would* have so descended, but for the intermediate ancestor, of whose existence the court could not have any knowledge until it was stated in the plea. By our law, the elder brother in such a case would not have taken the whole estate; and as it is settled that the demandant may recover an undivided part of the demanded premises (y), such a plea in the case above supposed would apply to a moiety only of the premises. But if J. had left a son, who had afterwards died without issue, the omission of that son would have the same effect here, as the omission of the elder uncle would have had at the common law.

Such a plea might be as follows:

8. Plea, mistake of the descent.

And the said T. comes and defends the right of the said D., and the seisin of the said J. when, &c. and says that the said D. his action aforesaid thereof against him ought not to have or maintain, because, protesting that the said J. never was seised of the said demanded premises, as the said D. has above in that behalf alleged, for plea he says that the said J. had issue a son named S. who survived him the said J.; and this he is ready to verify; wherefore, inasmuch as the said S. is not named in the writ and declaration aforesaid as the son and heir of the said J., he the said T. prays judgment if the said D. his action aforesaid thereof against him ought to have or maintain, and for his costs.

I have not met with any precedent of this plea; but the above form seems to contain all that is material (z). If it should be thought proper to plead it in abatement, instead of in bar, the plea will be easily altered by reference to the forms in the third Chapter.

The replication may either deny that J. ever had such a

(y) 2 Pick. R. 387. 3 Pick. R. 52. Hob. 282.

(z) See 46 E. 3. 9.

son, or may aver that he was a bastard. The former would be as follows :

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And the said D. says that he ought not, by reason of any thing by the said T. above in pleading alleged, to be precluded from having and maintaining his action aforesaid thereof against him the said T., because he says that the said J. never had any such issue S. as the said T. has above in that behalf alleged ; and this he prays may be inquired of by the country (a).

9. Replication,  
that J. never  
had such issue.

The replication that S. was illegitimate, would be substantially the same as the plea to that effect, in the writ of entry ; supra, Chap. IV. pl. 20.

*Judgment.*

The judgment, when for the demandant, may be as follows :

It is therefore considered by the court here, that the said D. do recover his seisin against the said T., of the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said T. and his heirs forever ; and that the said D. do recover against the said T. his costs of suit, taxed at —

10. Judgment  
for demandant.

The judgment for the tenant, when rendered on a verdict upon the general issue, or when it is otherwise conclusive as to the title, may be as follows :

It is therefore considered by the court here that the said T. shall hold the said messuage with the appurtenances (or, the said demanded premises) to him and his heirs, quit of the said D. and his heirs forever ; and that the said T. recover against the said D. his costs of suit, taxed at — (b).

11. Judgment  
final, for ten-  
ant.

If judgment is rendered for the tenant on any plea or issue which does not necessarily conclude the demandant as to the title to the land, as for example on a plea of a mistake in the descent, it would be, I presume, in the form that is used in other actions, viz.

a) See Rast. Ent. 50. (b) Co. Ent. 182. c. Dyer, 302. a.

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12. Judgment,  
that demand-  
ant take noth-  
ing by his writ.

It is therefore considered by the court here that the said D. take nothing by his writ aforesaid, and that the said T. go thereof without day ; and that the said T. recover against the said D. his costs of suit, taxed at —.

Blackstone (c) indeed says, that after issue once joined in a writ of right, the judgment is absolutely final. This is true, when the issue is joined on the mere right ; but not so, as I apprehend, when it is joined on any other plea, whether in bar or in abatement (d). If the traverse of the seisin of the demandant or his ancestor, should be pleaded alone, a verdict thereon for the tenant would undoubtedly be final and conclusive ; but it never is so pleaded, being always subjoined to the plea on the mere right.

(c) 3. 194.

(d) See 8 Co. 124.

## CHAPTER XV.

*Writs of Formedon.*

THIS action is seldom resorted to in our courts. Estates tail rarely exist among us; and when they are created, they are easily barred. One of the modes in which estates tail were sometimes created at the common law, by implication or construction upon devises, is abolished by our statute, 1791, c. 60. It is there provided that a devise to any person, "for and during such person's natural life, and after his death to his children, or heirs, or right heirs, in fee, shall be taken and construed to vest an estate for life only in such devisee, and a remainder in fee-simple in such children, heirs, or right heirs."

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The same statute also provides an easy and simple method of barring estates tail. This may be done by a deed of the tenant in tail, conveying the premises in fee-simple to any person capable of taking and holding real estate in this Commonwealth. The deed must be executed before two or more credible subscribing witnesses, and acknowledged before certain courts or magistrates in this State, or before a justice of the peace or magistrate, in some other of the United States, or in any other state or kingdom wherein the grantor may then reside; and it must be duly recorded in the Registry of Deeds. This mode of conveyance does not differ from that which is always adopted here on a sale by a tenant in fee-simple; although the law does not absolutely require in the latter case that there should be any subscribing witnesses. The statute further requires that this conveyance by the tenant in tail should be for good or valuable consideration, and made *bona fide*. Of course he cannot by any such conveyance change his estate tail into a fee-simple, to be

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held by himself, as he may do by a common recovery. He may sell and convey the land, as if he held it in fee; but if he conveys to any one, in trust for himself, he shall still hold it in tail, according to the original gift.

By the same statute all lands held in fee-tail are made liable for the payment of the debts of the tenant in tail, in the same manner as other real estates are liable, as well after the decease, as in the life time of the tenant in tail.

The above statute provides only for the case of a tenant in tail in possession. By an additional act (*a*) it is provided, that where there is an estate for life with remainder in tail, which might be barred by a common recovery, by the tenant of the freehold and remainder-man joining therein, it may be barred by the deed or deeds of those two parties, as effectually as it could be by suffering such common recovery; such deeds to be duly executed, acknowledged and recorded, as provided in the former statute above mentioned.

Neither of these statutes prevents the barring of estates tail by a common recovery; and they may accordingly be converted by that process into estates in fee-simple, as they might be at the common law.

In consequence of these statutes there will seldom be a conveyance by a tenant in tail that will amount to a discontinuance; and when the forfeiture is of such a kind as not to take away the right of entry, the heir in tail, or remainder-man, or reversioner, may enter, and then bring a writ of entry on his own seisin (*b*). As therefore the writ of Formedon is so seldom necessary in our practice, I shall give only one form of each of the three kinds of writs; referring the reader, for more particular information, to the books of entries, and other ancient books which treat of this action.

The count in formedon in descender may be as follows:

1. Count in  
Formedon in  
Descender.

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. a certain messuage with the appurtenances situate in, &c. bounded, &c. which one P. gave to one

(*a*) Stat. 1804, c. 59.

(*b*) See 1 Ld. Raym. 430.

G. and W. his wife, and the heirs of their bodies issuing, and which, after the death of the said G. and W. and of F. the son and heir of the said G. and W. and of B. the son and heir of the said F. ought to descend, according to the form of the gift aforesaid, to him the said D. as the brother and heir of the said B. and the grandson and heir of the said G. and W. as the said D. saith. Whereupon the said D. saith that the said P. gave the said messuage with the appurtenances to the said G. and W. and the heirs of their bodies issuing in form aforesaid; by force whereof the said G. and W. within twenty years now last past (c) were seised of the said messuage with the appurtenances in their demesne as of fee and right according to the form of the gift aforesaid, taking the profits, &c. and from the said G. and W. the right to the messuage aforesaid with the appurtenances descended according to the form of the gift aforesaid to the said F. as son and heir of the said G. and W. and from the said F. the said right descended according to the form of the gift aforesaid to the said B. as son and heir of the said F. and from the said B. for that he died without heirs of his body issuing, the said right descended according to the form of the gift aforesaid to him the said D. who now demands the same as brother and heir of the said B. and grandson and heir of the said G. and W. and which after the death [of the said G. and W. and of the said F. the son and heir of the said G. and W. and of the said B. the son and heir of the said F. ought to descend according to the form of the gift aforesaid to him the said D. as the brother and heir of the said F. and grandson and heir of the said G. and W.] and of which the said T. unjustly deforceth him.

The clause in brackets near the close of the count is usually expressed only by an &c. The allegation of de-

(c) In the English precedents, whenever seisin is alleged, it is stated to have been in the time of such a king—*tempore domini regis Henrici octavi*, &c. If it is necessary to state the time in our practice, it must be done as proposed in the above form; but it seems to be unnecessary, because if the tenant would take advantage of the statute of limitations he should plead it specially. Dyer, 315. 6 Co. R. 8. 4 Taunt. R. 826. 3 Brod. & Bing. 217. (But see 6 Mass. R. 328.) The limitation of actions of Formedon has the usual savings in favour of infants, married women, &c.; and of course when the statute is relied on by the tenant, the demandant ought to have opportunity to show in a replication that his case comes within some of those exceptions.



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forcement at the close is added for the reason mentioned above with regard to several other actions.

The pleas in abatement are substantially the same as those in writs of entry, excepting those few which are from their nature inapplicable to this action.

The above statutes, 1791, c. 60, and 1804, c. 59, furnish a plea in bar peculiar to our practice, by which a conveyance by the tenant in tail may be pleaded, with the same effect as a common recovery at common law.

The general issue to the preceding count would be as follows :

2. Plea, *Non  
dedit.*

And the said T. comes and defends his right when, &c. and says that the said P. did not give the said messuage with the appurtenances to the said G. and W. and the heirs of their bodies issuing in manner and form as the said D. has above in his writ and declaration aforesaid alleged; and of this he the said T. puts himself on the country, by A. B. his attorney.

And the said D. likewise, by E. F. his attorney.

The effect of this plea is, to deny that there ever was such an entail as set forth in the count; and therefore any legal evidence, tending to show that the supposed gift never existed, or was ineffectual (*d*), is admissible on the part of the tenant. If it appears for example, that the supposed donor was not seised at the time of the gift (*e*), or that the supposed instrument of conveyance is not his deed, or that it creates a different estate from that set forth in the writ, the issue will be found for the tenant. If the tenant relies on any other ground of defence he must plead it specially.

Count in formedon in remainder :

3. Count, in  
Formedon in  
Remainder.

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. a certain piece of land containing one hundred acres with the appurtenances situate in — bounded, &c. which one G. gave to one H. and the heirs of his body issuing, so that if the said H. should die without heirs of his body issuing, the said land should remain to one R. and the heirs males of his body issuing; and which after the death of the said H. and

(*d*) See 2 Taunt. R. 282.

(*e*) Dyer, 122.

R. ought to remain to the said D. the son and heir of the said R. according to the form of the gift aforesaid, because the said H. died without heirs of his body issuing, as the said D. saith. And whereupon the said D. saith that the said G. gave the said demanded premises to the said H. and the heirs of his body issuing, so that if the said H. should die without heirs of his body issuing the said premises should remain to the said R. and the heirs males of his body issuing; by virtue of which said gift the said H., within twenty years now last past (*f*), was seised of the said demanded premises in his demesne as of fee and right according to the form of the gift aforesaid taking the profits, &c. and from the said H. because he died without heirs of his body issuing, the right to the said demanded premises remained, according to the form of the gift aforesaid to the said D. as son and heir of the body of the said R. issuing: and which after the death, &c. because, &c. and of which the said T. unjustly deforces him the said D.

## General issue :

And the said T. comes and defends his right when, &c. and says that the said G. did not give the said demanded premises to the said H. and the heirs of his body issuing, so that if the said H. should die without heirs of his body issuing the said premises should remain to the said R. and the heirs males of his body issuing, in manner and form as the said D. has above in his said writ and declaration alleged; and of this, &c.

4. Plea, *Non dedit.*

Or the plea may be in a shorter form; which will be found convenient when there are several remainders, or limitations over, set forth in the writ; as follows :

—and says that the said G. did not give the said tenements with the appurtenances to the said H. and the heirs of his body issuing, with the remainder thereof expectant, in manner and form as the said D. has above in his said writ and declaration thereof alleged: and of this, &c.

5. *Aliter.*

## Count in formedon in reverter :

Summon T. to answer to D. in a plea of land, wherein the said D. demands against the said T. a certain piece of land, &c. which one G. the grandfather of the said D. whose heir he the said D. is,

6. Count, in Formedon in Reverter.

(*f*) See the note *supra*, to pl. 1, in this Chap.

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gave to one H. and the heirs of his body issuing, and which after the death of the said H. ought to revert according to the form of the gift aforesaid to him the said D. as the grandson and heir of the said G. for that the said H. died without heirs of his body issuing, as the said D. saith: And whereupon the said D. saith that the said G. was seised of the said demanded premises in his demesne as of fee and right, taking the profits, &c. and being so thereof seised, gave the said premises to the said H. and the heirs of his body issuing in form aforesaid; by virtue of which said gift the said H., within twenty years now last past (g), was seised of the said premises in his demesne as of fee and right according to the gift aforesaid, taking the profits, &c. and from the said H. for that he died without heirs of his body issuing, the right to the said demanded premises reverted, according to the form of the gift aforesaid, to him the said D. as the grandson and heir of the said G. to wit, as the son of one F. who was the son of the said G.: and which after the death, &c. for that, &c. and of which the said T. unjustly deforces him the said D.

In one of the precedents in Rastel, 275, it is stated that the estate descended to W. the son and heir of H. (the donee) and that W. died without heir of his body issuing. But this is incorrect; because although W. had no issue, yet there might have been another son of H. who would have been entitled to the estate; and it ought to appear distinctly in the writ and declaration that there is not now extant any issue of H. that can inherit by force of the gift (h). And if H. is dead, and there is no such issue of his now living, this will support the averment, that he died (that is, that he *is dead*) without issue, although he might have left issue living at the time of his death.

There is one case in which it might be necessary to allege a seisin in the issue of the donee; and that is, when the donee should have died twenty years before the commencement of the action; by which the demandant would be barred, unless his case came within some of the savings of the statute of limitations, or unless he could show a seisin in the issue of the donee within that

(g) See the note supra, to pl. 1. in this Chap.

(h) 8 Co. 87. Buckmere's case. F. N. B. 220. E. Dyer, 216.

period. If the count should allege such a seisin in the issue, it ought also to show distinctly, not only that that issue died without issue, but that there is not now living any other issue of the donee : as, for example, to state that the estate descended to W. *the only child and heir* of H. and that W. is dead without issue ; or, if H. had other children, to state that they are all dead without issue.

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The general issue to this count would be the same as that to the count in descender.

## CHAPTER XVI.

## SECTION I.

*Writ of Dower.*

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THERE are in the English practice two different writs of dower, both of which are considered as writs of right in their nature. One is called the writ of dower, *unde nihil habet*; which lies in every case, excepting only when the widow has received a part of her dower of the same person who is sued, and out of lands in the same town. Before the statute of Westm. 1, if the widow had received any part of her dower, the tenant might plead it in abatement of this writ *unde nihil habet*, although it was not received of himself; and the widow was then driven to her writ of right of dower. If therefore there were many tenants of distinct parcels of land of which she was dowable, and any one of them refused to assign her dower, she could not receive it of the others, without losing the benefit of this action. To prevent this delay and embarrassment to the widow, it is provided by the statute before mentioned, cap. 49 (*a*), that this plea shall not avail the tenant unless she had received the part of her dower of himself, and in the same town, before the purchase of her writ.

We have a statute for the speedy assignment of dower (*b*), which prescribes the form of the original writ and of the writ of seisin, and the course of proceedings in the action. In the form of the writ of seisin there given it is said, in reciting the judgment, that the demandant had recovered the premises "by our writ of dower *whereof she hath nothing*;" from which it is to be infer-

(*a*) 2 Inst. 261.

(*b*) Stat. 1783, c. 40.

red that this is the action intended by the legislature. From the facility with which the titles and estates of those who hold lands can be generally discovered, in consequence of our laws for the registry of deeds and conveyances of land, a case can rarely occur here, in which the widow would have occasion to bring a writ of right of dower; and I have never known any such action in our courts. When the husband dies seised, the widow's dower may be assigned and set out to her by the Probate Court, in which her husband's estate is settled; and this is the most usual and most convenient course. If the husband had aliened the land in his life time, or if from any other cause the dower is not assigned by the Probate Court, the widow may, by the above mentioned statute, 1783, c. 40, demand her dower to be assigned and set out to her by the heir, or other person having the next immediate estate of freehold or inheritance; and if he do not, within one month after the demand, assign her dower in the whole of which he is seised, she may refuse to accept any part, and may bring her action according to the statute.

Our statute may perhaps be considered as having provided the writ therein mentioned as an adequate remedy for the widow in all cases. But if the common law in this particular is still in force here, so that the receipt of part of her dower in the manner before mentioned would be a bar to this action, there can be no doubt that the other branch of the same law would be adopted likewise, so as to give to the widow in such a case a writ of right of dower.

If the demandant recovers in this action, she is by the same statute entitled to reasonable damages from the time of her demand; which damages would of course be equal to the rents and profits of her third part for that time. At the common law no damages were recoverable in this action. By the statute of Merton (*c*), if the husband died seised of the land, the widow on recovering her dower, recovered also damages equal to the value of the

(*c*) 2 Inst. 80.

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dower from the time of the husband's death ; or, according to the better opinion, from the time of making her demand (*d*). Our statute above mentioned makes no distinction of that kind ; but awards damages to her, from the time of her demand, whether her husband died seised or not ; and by a later statute (1816, c. 84) she is entitled in all cases, where her husband dies seised, to one third of the rents and profits from the time of his death until her dower is assigned.

The three points necessary according to the common law for maintaining this action are the marriage, the seisin of the husband during the coverture, and the death of the husband ; but by our statute 1785, c. 69, if the parties have been divorced for the cause of adultery committed by the husband, the wife is entitled to have her dower assigned in his lands, "in the same manner as if he was naturally dead."

The marriage must be lawful ; and according to the common law, must continue till the death of the husband ; so that a divorce *a vinculo matrimonii* would be a good bar to the action. It is still a good bar here in every case excepting that before mentioned, of a divorce for the adultery of the husband. By our law, a divorce for the adultery of either party is always *a vinculo*.

As to the seisin of the husband during the coverture, a seisin in law is sufficient, and will entitle the widow to maintain this action. As if lands descend to the husband, who dies without making an actual entry, his widow shall be endowed ; because it is not in her power to compel him to enter (*e*). This however should probably be confined to the case of a descent occurring during the coverture. After the marriage, the husband cannot by any conveyance or act by himself alone defeat his wife's right of dower in his lands (*f*) ; and therefore when the law has cast the freehold on him, he ought not to be permitted at his own pleasure to prevent the completion of

(*d*) Co. Lit. 32. 1 Cruise's Dig. 169. (*e*) Co. Lit. 31. a.

(*f*) See Plowd. Qu. 54. pa. 6. Recovery in Cessavit against the husband, will not bar the wife.

his title, and thereby to preclude the right of his wife. This, as to its effect on the title of his wife, would be equivalent to a conveyance of his land. But as he may by a conveyance before marriage prevent the claims of his future wife, so in the case of a descent occurring before marriage it seems that he may refuse to enter, and in that manner virtually release and convey his land before her inchoate title to it can commence. However this may be, it is clear that if, in case of such a descent, a stranger has become seised of the lands by abatement before the marriage, the wife cannot be endowed, unless the husband enters, or recovers the land by action during the coverture. And, on the other hand, if the descent occurs after the marriage, or if the husband is disseised of any land during the coverture, the widow may maintain her action for dower against the abator or disseisor.

If the seisin of the husband is lawfully defeated during the coverture, his widow cannot be endowed. As if, after he has entered on land descended from his father, his mother has her dower assigned out of the same land; now the mother being in *by* her husband, and immediately under him, the son is considered for this purpose as never having been seised of the part so assigned to her (*g*). But if the mother afterwards dies before the son, his widow would be dowable of the whole.

The estate which the husband had in the land must be such, that the issue, if any, begotten between him and his wife might by possibility have inherited it. Therefore if land were given to him and his heirs begotten of a former wife, the last wife would not be entitled to dower, whether he left issue by the former or not. If the husband were seised as a joint-tenant, and died before his companion, the latter will take the whole land by survivorship, and exclude the widow. If the husband has conveyed his land by way of exchange, the widow may be endowed at her option of that which was given, or that which was taken in exchange; but not of both; though he was seised of both during the coverture (*h*).

(*g*) Co. Lit. 31.

(*h*) Co. Lit. 31.



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By the immemorial usage and common law of this State, a wife may bar herself of her dower, by joining with her husband in a deed for the conveyance of his land, therein expressing that she releases her claim to dower; or by her deed made after the conveyance by her husband, reciting that conveyance as a consideration, and releasing her claim to dower in the land so conveyed by him (i).

In the English practice there is not, strictly speaking, any count on a writ of dower, like those in other real actions; that is, there is no distinct allegation of the several facts on which the demandant founds her right to recover. There is only a demand, or plaint, specifying the land, and claiming the third part of it as her dower. Such a writ and plaint, with the usual alterations to adapt it to our practice, would be as follows:

1. Count in  
Dower, with-  
out previous  
demand.

Summon T. to answer to D. of — widow, who was the wife (k) of one A. B. late of — deceased, in a plea of *dower* (l), wherein she demands against the said T. one third part of a certain piece of land with the appurtenances situate in — containing sixty acres and bounded, &c. as her dower of the endowment of the said A. B. her late husband, whereof she hath nothing; and of which the said T. deforceth her, as it is said; to the damage, &c.

If it is thought necessary to allege a previous demand of her dower, pursuant to the statute, the count, after the words “whereof she hath nothing,” would proceed as follows:

2. — with  
averment of a  
previous de-  
mand.

— as it is said; and the said D. says that after the death of the said A. B. the said T. had the next immediate estate of freehold in the said described premises, and afterwards, to wit, on the — day of — she the said D. did demand of the said T. to assign and set out to her, her dower, or just third part, of and in the same premises; but although one month after the making of the said demand is long since past, the said T. hath refused, and still doth refuse, to assign and set out to her her dower as aforesaid, and unjustly deforceth her thereof; to the damage, &c.

(i) 7 Mass. Rep. 14. *Fowler v. Shearer*.

(k) See Cro. Jac. 217. *Fulliam v. Harris*, that the want of this averment would abate the writ.

(l) See Stat. 1783, c. 40. § 3.

The allegation of a deforcement at the close of the demand or plaint, is not found in the English precedents. It is however inserted in the English writs, and therefore cannot be improper in this place ; and it serves in our practice to introduce the *ad damnum*, which immediately follows, according to the form of the writ of dower prescribed by the statute 1783, c. 40.

A demand, or plaint, like the foregoing, is considered as containing implied averments of the marriage, and of the seisin and death of the husband ; insomuch that the tenant may in a plea in bar deny either of those facts, as if it were expressly alleged. The marriage, if put in issue, is tried by the certificate of the Bishop (*m*) ; and the question, whether the husband is dead, is tried on the examination of witnesses by the court, without the intervention of a jury (*n*) ; therefore on those two points no issue is ever joined in the common form. But when the tenant traverses the seisin of the husband, which is triable by jury, his plea concludes to the country (*o*) ; as in all other actions when any material fact alleged in the declaration is traversed.

The allegation of the previous demand by the widow is obviously necessary, whenever such a demand is required to entitle her to damages ; because in our practice there is no other mode by which the tenant can be apprized that she makes such a claim, and can have opportunity to resist it. In the English practice, after judgment for the demandant for seisin of the third part of the land, (if upon default, or otherwise, without verdict,) the demandant enters on the record a suggestion that her husband died seised of the premises, in order to entitle herself to damages according to the provisions of the statute of Merton. Thereupon a writ of inquiry is issued to the sheriff to ascertain whether the husband died seised, and if he did, then to find the annual value of the land,

(*m*) Rast. Ent. 228.

(*n*) Rast. Ent. 228. 2 Inst. 80. Benloe, 86, pl. 131.

(*o*) Co. Lit. 126. a.

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and the damages sustained by the demandant (*p*). The tenant of course would have notice of the taking of this inquisition, and might appear before the sheriff, to contest the fact of the husband's dying seised, as well as to prevent the recovery of excessive damages. But in this State damages are never assessed, in any action at common law, by an inquisition taken by the sheriff out of court. If there is any issue of fact joined by the parties, the jury who try that issue also assess the damages, when damages are to be recovered. If there is no issue of fact, and judgment is rendered for the demandant on demurrer or default, the damages are assessed either by the court, or by a jury empaneled for that purpose in court. If therefore the tenant is defaulted, the demandant in our practice would proceed immediately to prove her damages, without any new notice to the tenant. The consequence is that the tenant would have no opportunity in any stage of the cause to traverse the previous demand, unless it were alleged in the original writ or plaint. By our statute 1784, c. 28. § 7, when the tenant or defendant in any action is defaulted, all the material facts in the declaration are taken and deemed to be true. The demandant in the writ of dower, in order to avail herself of this provision, ought to allege distinctly the previous demand and refusal, when she intends to rely upon it for the recovery of damages.

It has been not unusual in our practice to add a count in writs of dower, corresponding in some measure to the counts in other real actions. It contains, besides the averment of the previous demand by the widow, a direct averment of the seisin of the husband. There appears to be no reason for inserting this latter averment, which would not apply equally to the averment of the marriage, and the death of the husband. All three of these points are equally material; and they are all traversable; yet it has never, as I apprehend, been deemed necessary with us to insert the two latter averments. If however it

(*p*) Townsend's 2d book of judgments, 93. 2 Saund. 44. note 4. by Williams.

should be thought proper to allege the seisin of the husband, the demandant will state her claim or demand as in the above pl. 1 ; and then proceed as follows :

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—whereof she hath nothing ; as it is said : And whereupon the said D. says that the said A. B. heretofore, in his life time, and during the intermarriage between him and the said D. was seised of the whole of the above described tenements with the appurtenances in his demesne as of fee, (or, in his demesne as of fee-tail, to wit, to him and the heirs of his body lawfully begotten—or, to him and his heirs of the body of the said D. his wife begotten,) and after the death of the said A. B. the said T. had the next immediate estate of freehold, &c. (*stating the previous demand, &c. as above in pl. 2.*)

3. — with  
averment of  
the husband's  
seisin.

If the seisin of the husband is alleged, it seems proper to mention of what estate he was seised, so that it may appear to be one out of which the demandant is dowerable. It seems unnecessary to aver it to be a seisin in deed, “ by taking the profits ;” as we have already seen that a seisin in law is sometimes sufficient.

Upon the construction of the above mentioned statute concerning dower, it has been decided that the action must be brought against the actual tenant of freehold ; and that it will lie against him for the damages as well as for the land, although the previous demand should have been made of a former tenant (*q*). In such a case the count might be varied by stating the previous demand as follows :

—and after the death of the said A. B. one R. S. had the next immediate estate of freehold in the said described tenements with the appurtenances, and afterwards, to wit, on — she the said D. did demand of the said R. S. to assign and set out to her her dower or just third part of and in the same tenements with the appurtenances ; but although one month after the making of the said demand is long since past, yet neither the said R. S. nor the said T. has assigned and set out to her her dower as aforesaid, but they and each of them have neglected and refused so to do, and the said T. still unjustly deforces her thereof.

4. — aver-  
ment of pre-  
vious demand  
of a former  
tenant.

(*q*) 12 Mass. R. 485. Parker v. Murphy.

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In this last form there is no statement of the title of the tenant, nor of the manner in which he acquired the land from the former owner of it. This is required only in a writ of entry; in which the demandant founds his right to recover on the defective title of the tenant, as set forth in the count. But in this writ, as in every other which is in the nature of a writ of right, the demandant relies on his own title as set forth in his writ or count. The bringing of the action is an implied averment that the party sued is the actual tenant of the freehold; and there is moreover an allegation of deforcement by him. Such an allegation contains no intimation of the manner in which the tenant acquired the possession; but implies merely that he now withholds the land from the party who is entitled to it.

If the parties have been divorced for the adultery of the husband, and the action is brought against him, the form may be as follows:

5. Count  
against hus-  
band, after di-  
vorce for adul-  
tery committed  
by him.

Summon T. to answer to D. of — single woman, and late the wife of the said T. from whom she has been divorced, in a plea of dower, wherein she demands against the said T. one third part, &c. as her dower, of the endowment of the said T. whereof she hath nothing, as it is said. And whereupon the said D. says that during the intermarriage between the said T. and D. he the said D. was seised of the whole of the above described premises with the appurtenances in his demesne as of fee, and that afterwards, to wit, at the Supreme Judicial Court begun and held at — within and for the county of — on the — day of — she was by the decree of the justices of the same court divorced from the said T. for the cause of adultery committed by him; as by the record thereof in the same court remaining more fully and at large appears; and that after the said divorce the said T. continued seised of the whole of the said described premises, and had the next immediate estate of inheritance therein; and the said D. further says, that afterwards, to wit, on — she demanded of the said T. to assign, &c. (*as above in pl. 2.*)

In all the other forms it is thought sufficient to aver that the person first seised had a freehold estate; as that averment is within the terms of the statute, and would be well proved by showing that he had an estate, either

in fee, in tail, or for life. So in the preceding case, if the husband had before the divorce aliened the land in fee, and taken back an estate for life, it would be sufficient to aver that he had a freehold. But as he must have been seised during the coverture of an estate of inheritance, to entitle his wife to dower, it seems proper, when he continues so seised, to make the averment accordingly.

If the action is brought against any stranger to whom the husband had aliened, the count may be readily framed, by reference to the preceding forms. Instead of saying that the tenant, or other person of whom the demand was made, had the next immediate estate after the death of her late husband, she would say that it was after the said divorce.

The writ of right of dower, if maintainable here, may be easily framed from the writ *unde nihil habet*. By the ancient common law, this writ, like many other writs of right, was directed to the heir of the husband, or to the lord of the fee; and commanded him "to hold full right" (*plenum rectum teneas*) to the widow, of the third part of ten acres of land, &c. &c. (*r*). In our practice, the writ must be directed to the sheriff, and returnable to the proper court; and I am not aware that any change of the above forms is necessary, excepting to omit the words, "whereof she hath nothing" (*s*).

## SECTION II.

*Pleas in actions of Dower.*

The pleas to the writ, or to the action of the writ, that may be found necessary or useful in this action, will be readily formed from the like pleas in the writs of entry.

It is said to have been decided, in the Supreme Judicial Court, Suffolk, August Term, 1796 (*t*), that the want

(*r*) See Register, 3.(*s*) See Booth, 118. 166.(*t*) Story's Pleadings, 353. Coffin v. Coffin.

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of a demand by the widow, pursuant to the statute 1783, c. 40, must be pleaded in abatement. But in another case in Essex, in the year 1794, the same matter was pleaded in bar of damages (*u*). The plea does not give the demandant a better writ; but is predicated on the supposition that the widow cannot recover the land and the damages, without such a demand. It seems therefore that the plea traversing the demand ought to be pleaded in bar of the action, if such a demand is a necessary prerequisite to the bringing of the action; or in bar of the damages, if the demand is required only to entitle the demandant to damages; and that it is not a proper plea in abatement.

By the statute 1816, c. 84, the widow is entitled to one third of the rents, income and profits, in all cases where her husband died seised, from the time of his death until her dower is assigned. In cases of this kind, the heir, or other person claiming under the husband, cannot in general be ignorant of the widow's title to dower; and if he receives the whole rent or income, it is just and reasonable to suppose that he takes the one third of it as trustee for the widow; but a stranger, who held the land in the husband's life time, might have no notice of the widow's title, and is not liable for the rents until after a demand by the widow.

It appears not improbable that this demand was originally prescribed by our statutes (*x*), merely to entitle the widow to damages, and not as necessary to the maintenance of her action for the land. Her title to dower was established by the common law, and had been recognised by other statutes. The legislature, in the statute of 1783, do not give to the widow a right of dower; but assuming that she is already entitled to it, they make provision for its more speedy assignment, by providing among other things for damages to be paid to her, if it

(*u*) *Ib.* Neck v. Lee.

(*x*) See Provincial statute, 13 Wil. 3. Prov. Laws, 359. The 2d. sect. provides for the case of the widow's recovering her dower, without damages.

is not assigned when demanded. In England, the widow recovers her dower by the common law, and her damages by statute; and they are considered as several judgments in their nature, so that the judgment for the damages may be reversed, and that for the land be affirmed, on a writ of error (*y*). Upon the construction of our statute which I have above suggested, a widow, if she was willing to waive her claim to damages, might maintain her action without alleging or proving any previous demand; and of course the want of such a demand could not be pleaded in bar of the action, but only in bar of damages. But as the language of the statute seems to require a demand in all cases, and as it has been usually so understood and construed, it seems to be the safest course, until some judicial decision of the point, for the demandant to make such a demand, and to state it in her count, and for the tenant, when traversing it, to conclude his plea in bar of the action.

As the demandant's right to dower depends on three distinct and independent points, to wit, the marriage, the seisin of the husband, and his death, all of which are equally material, it follows that there is no general issue, in the common acceptation of that term, that is, no plea that puts in issue the whole gist of the declaration; and if the tenant means to deny either of those three facts, he must traverse it distinctly. At common law he could not traverse more than one of them; because either, if found for him, was a complete bar; and he cannot now do it without obtaining leave to plead double (*z*).

A plea traversing the marriage may be as follows:

And the said T. comes and says that the said D. ought not to have her dower in this behalf as having been the wife of the said A. B. because the said T. says that she the said D. never was ac-

6. Plea, traversing the marriage.

(*y*) Co. Lit. 32. note 198. See 2 Saund. 44. note 4. Ibid. 328.

(*z*) See W. Black. R. 1157. 1207, where leave was refused to plead *ne unques seisie que dower*, and *ne unques accouple*, &c. But the principal reasons there given do not apply in our practice. The issues are both triable by jury in our courts; and the pleading does not delay the demandant.



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coupled (or, joined) to the said A. B. in lawful matrimony; and of this he puts himself on the country. Or,

—comes and says that the said D. ought not to have her dower of the tenements aforesaid, because he says that the said A. B. of whose endowment she demands her dower, and she the said D. never were joined together in lawful matrimony; and of this, &c. (a).

I have concluded this plea to the country, although it is never so done in the English practice. The reason there is, that the question of the marriage is usually tried by the certificate of the Bishop. The plea therefore concludes with a special averment, as in other cases when the matter is not to be tried by a jury: “et hoc paratus est verificare, ubi et quando (or, qualitercunque) curia considerabit.” The replication then usually alleges a marriage in some particular diocese in England, and concludes with a like averment; whereupon a writ is issued to the Bishop of that diocese, to certify whether the parties were lawfully married. If the marriage was celebrated in a foreign country, the replication must so state it, and conclude with tendering an issue, which will be tried by a jury (b). But as the tenant, when making his plea, cannot foresee what will be the replication, he must plead in such a manner that the demandant may reply in either mode, as her case may require. In our practice there is no occasion whatever for any replication. The record need not show in what particular place the marriage was celebrated; because wherever celebrated, it must be tried by a jury in the county where the action is pending. The plea is like any other plea which denies some one material fact in the declaration, and which, if found for the tenant, is a complete bar to the action. In such cases the plea should always conclude to the country, unless there is something in the nature, or form, of the averments that requires a different course. It is true that in this case the marriage is not expressly alleged in

(a) See Rast. 228, 229.

(b) 2 H. Black. 145. Ilderton v. Ilderton.

the declaration; and neither is the seisin, nor the death of the husband, so alleged in the English forms; but they are all considered as implied, and virtually alleged (c); and accordingly, when the seisin of the husband is traversed, (which fact is there triable by jury) the plea concludes to the country (d). As it appears therefore that the only reason for concluding this plea with a verification is one which does not exist here, we ought to conclude it to the country, according to the general rules applicable to such pleas in other cases. If however it should be thought proper to conclude the plea with an averment, that averment must be in the form common in other pleas, and not in the special form above mentioned, as used in the English courts; and the replication will set forth a marriage, and conclude to the country.

The tenant never makes *defence* in the commencement of his plea. He "comes and says," omitting the words, "and *defends*," &c. (e).

The plea traversing the seisin of the husband is as follows:

And the said T. comes and says that the said D. ought not to have her dower of the tenements aforesaid with the appurtenances of the endowment of the said A. B. because he says that the said A. B. neither at the time when he married the said D. (or, neither at the time of his supposed marriage with the said D.) nor at any time afterwards, was seised of the tenements aforesaid with the appurtenances whereof the said D. above demands her dower (or, was seised of the above described tenements) of such an estate that he could have endowed the said D. thereof: and of this he puts himself on the country (f).

7. Plea, traversing the seisin of the husband.

This manner of pleading in general terms, that the husband "was never seised of such an estate that he could endow his wife," &c. is conformed to the demand

(c) See 2 Saund. 10. note 14. 2 Salk. 629, that whatever is necessarily understood, intended, and implied, is traversable, as much as if it were expressly alleged.

(d) Rast. 230.

(e) Rast. 232.

(f) Rast. 230. 3 Ld. Raym. 192.

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or plaint in the English practice; which does not set forth of what estate the husband was seised. And a verdict for the demandant on such an issue, finds only that the husband did "die seised of such an estate that he could endow the said D. thereof," &c.; without specifying what estate it was (*g*). The allegation by the demandant of the seisin and estate of her husband will probably be found unnecessary in our practice; but if it is retained in the count, the above plea ought to be altered to correspond to it. The plea in that case might set forth what estate the husband had, if any, as for life, or in special tail; or, set forth an estate in the tenant, or in some other person; and in either case traverse the estate of the husband as alleged in the count, and conclude to the country. Or perhaps it would be sufficient, without any inducement, to deny that the husband was seised in his demesne as of fee, or fee-tail, &c. in manner and form as alleged in the count, concluding to the country.

A plea denying the death of the husband, might be as follows:

B. Plea, traversing the death of the husband.

And the said T. comes and says that the said D. ought not to have her dower of the tenements aforesaid with the appurtenances, because he says that the said A. B. of whose endowment she the said D. has above demanded her dower of and in the above described premises, was living at the time of the commencement of this action; without this, that the said A. B. was dead at the said time of the commencement of this action, as the said D. has above in that behalf supposed; and of this he puts himself on the country.

The precedents of this plea in Rast. 228, and Winch's Ent. 358, aver that the husband is *now* living. That averment cannot be amiss, when the fact is so; but if he was alive at the commencement of the action, that is a complete bar, although he may have since died. The averment therefore which I have above proposed will answer in every case, and it serves better to introduce the traverse which follows.

The above plea differs also in other respects from the English precedents. By the common law the issue on

(*g*) Aston's Ent. 291.

this plea was tried by the court, upon an examination of witnesses before them, without the intervention of a jury (*h*). The plea accordingly concludes with a special averment, like the above mentioned plea of *ne unques accouple*, &c. and the replication concludes in like manner. But by our law this issue is tried by a jury in the usual manner; and the reasons given above for the alteration of the other plea apply with equal force to this.

This plea also differs from the two preceding, in containing an inducement and a formal traverse, instead of a simple denial. This arises from the nature and form of the implied allegations which are denied in the respective pleas. In the two former cases the allegation is affirmative, to wit, "that A. B. was seised," or, "that A. B. and the demandant were lawfully married;" and a bare denial of that proposition forms a perfect issue, an affirmative and a negative. But in this third case the allegation is, "that A. B. is dead," and the tenant alleges "that he is living;" which two affirmatives, though in their nature contradictory to each other, do not form an apt issue. It is therefore necessary to add a traverse of his death at the time supposed.

If this plea introduced any new matter, it ought to conclude with a verification, to give the demandant an opportunity of answering that new matter. But the inducement to the traverse contains nothing but a denial of a fact which had been alleged by the demandant; and the only use of the formal traverse is to put that denial in a proper form for trial. In the case of *Filewood v. Popplewell & al.* (*i*), which was a Sci. Fa. against bail, the defendants pleaded that the principal died before the return of any Ca. Sa. against him. The plaintiff replied a Ca. Sa. issued and returned at such a time, and that the principal was alive at the time of the return; and concluded with a verification. Upon a demurrer to this replication the court held it good; and in two subsequent

(*h*) Rast. 228. Dyer, 185. *Thorne v. Rolfe*. Benl. 86. S. C. where the proceedings are set forth at large. 3 Bl. Com. 336.

(*i*) 2 Wils. 61.

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cases (*k*) a similar replication was held good, upon a special demurrer showing for cause that it ought to have concluded to the country. The reason given was, that the writ of Ca. Sa. pleaded by the plaintiff was new matter, which the defendant ought to have opportunity to answer. These cases seem to prove *é converso* that if the replication had merely traversed the allegation of the party's death before a given time, it ought to have concluded to the country.

On this plea to the writ of dower there is nothing that can be specially replied, in maintenance of the action. The fact alleged (by implication) in the count, and denied by the plea, is absolutely essential. The demandant cannot in any way confess and avoid the matter of the plea, or qualify her own implied allegation. She must prove it simply and absolutely as alleged. She cannot offer any other issue than that presented by this plea of the tenant; and therefore he may conclude the pleadings at once by tendering the issue.

If the want of a previous demand by the widow is pleadable in bar of the action, by force of our statute 1783, c. 40, such a plea might be as follows :

9. Plea, denying the demand to assign dower.

And the said T. comes and says that the said D. her action aforesaid thereof against him ought not to have or maintain, because he says that the said D. did not demand of him the said T. (or, of the said R. S.) to assign and set out to her her dower of and in the said premises above in the writ aforesaid mentioned, in manner and form as the said D. has above in that behalf alleged; and of this he puts himself on the country.

This plea does not deny the demandant's title to dower, but is pleaded as a bar to the present action. It therefore begins like a common plea in bar, to wit, "that she ought not to have her action, &c." and not, like the preceding pleas, "that she ought not to have her dower," &c. This form is frequently adopted in Rastel's entries, when the plea, instead of denying either of the three material facts on which the title to dower is founded, un-

(*k*) Doug. 58. 2 Durn. & East, 576.

dertakes to bar the action by new matter set forth in the plea. But this distinction seems to be disregarded in Coke's, Aston's, Winch's, Herne's, and other entries; and the difference appears to be immaterial.

This denial of the previous demand is sometimes preceded by an allegation, that the tenant has always been ready to render to the demandant her dower, &c.; but such an allegation is unnecessary in our practice, because if the matter is pleadable in bar, it is by force of our statute; and the demand being explicitly alleged by the demandant and denied by the tenant, it forms an apt issue, and contains every thing which need be inquired of by the jury on this point. In the English practice the tenant may plead *tout temps prist* in bar of the damages, without denying a previous demand, because no such demand is alleged in the plaint or count; and the demandant, if she would recover damages, must in her replication set forth a demand and refusal (l).

If it should be decided that this want of a previous demand is pleadable in bar of the damages only, the plea might be as follows:

And the said T. comes and says that the said D. ought not to have or maintain her action aforesaid thereof against him, to recover any damages by reason of the said supposed *holding and keeping her out of her dower aforesaid* (m), because he says that the said D. did not demand of him the said T. to assign and set out to her her dower of and in the said tenements with the appurtenances above in the writ aforesaid mentioned, in manner and form as the said D. has above in that behalf alleged; and of this he puts himself on the country.

10. Plea, in bar of damages, denying the previous demand.

The plea of *tout temps prist*, &c. at the common law, impliedly admits, and sometimes expressly confesses, the demandant's right to dower; and alleges that the tenant has been always ready to render it (n). But by our law, although the tenant has always disputed the right to dower, and still contests it in the present action, yet he is liable for damages only from the time of such a demand.

(l) Co. Lit. 32, 33.

(m) See stat. 1783, c. 40.

(n) See Rast. 236, 237.

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It is therefore obvious that he may plead this matter (whether it is pleadable in bar of the action, or of the damages) without confessing the demandant's right to dower; and on leave to plead double, he might plead it with any other plea in bar.

If however this matter is pleadable in bar of damages, it would also I presume be allowed to be pleaded with a plea in bar of the action, without obtaining leave to plead double. In the English practice, when the tenant has been defaulted, and the demandant suggests that her husband died seised, &c., a writ is issued to the sheriff, to inquire by a jury "whether A. B. formerly the husband of D. B. died seised in his demesne as of fee-simple, or fee-tail, of such a messuage whereof the said D. B. in our said court has recovered the third part as her dower, &c. against T. by the default of the said T. *et si per inquisitionem illam ita inveneris, tunc per eorum sacramentum diligenter inquireas*" as to the annual value of the tenements, and how long a time has elapsed since the death of the husband, &c. In like manner the tenant, when he has pleaded in bar of the action, and would also deny the demand, might perhaps plead as follows :

11. Plea, in bar of the action, and also of the damages.

And the said T. comes and says that the said D. ought not to have her dower of the tenements aforesaid with the appurtenances [*&c. as in pleas No. 6, 7, or 8, but not tendering the issue.*] And if it should be found by the jury (or, if it should appear to the jury) that the said A. B. and the said D. ever were joined together in lawful matrimony (or, that the said A. B. was so seised of the tenements aforesaid with the appurtenances—or, that the said A. B. was dead at the time of the commencement of this action) then the said T. says that the said D. ought not to recover any damages against him by reason of the said supposed holding and keeping her out of her dower aforesaid, because he says that she the said D. did not demand of him the said T. to assign and set out to her her dower of and in the tenements aforesaid with the appurtenances in manner and form as the said D. has above in that behalf alleged; and of this he puts himself on the country.

Or, instead of the above clause, "if it should be found by the jury that the said A. B. &c." the tenant may proceed immediately to the second part of the plea :

—And the said T. also says, that the said D. ought not to recover any damages against him by reason, &c.

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This latter mode of pleading resembles that above proposed in a writ of right, when the tenant joins the mise on the mere right, and also traverses the seisin (*o*).

If this want of a previous demand is a bar to the action, it never can be thus joined to any other plea in bar; because it would make the plea double. It must in such case be pleaded separately, under leave to plead double.

If the tenant cannot deny either of the three points of the demandant's title, to wit, the marriage, the seisin, and the death of the husband, and if the widow duly demanded her dower, still there are various other matters which might anciently be pleaded in bar of the action, most of which are good bars in our law. The pleas of detainment of charters, or detainment of the heir, as also, that the demandant was not of dowable age, seem to be incompatible with our laws and usages. The plea of elopement is said to have been held a good bar, in a case in the county of Essex in the year 1789 (*p*). By our statute 1785, c. 69, the adultery of either party is a sufficient cause of divorce *a vinculo matrimonii*; and such a divorce is a bar of dower at common law (*q*). It is a bar here, when it is for adultery committed by the wife. The husband therefore may always procure a divorce in case of such elopement; so that such a plea would be seldom necessary, even if allowable in our practice. The plea of such a divorce may be readily formed by reference to the count No. 5, above in this chapter.

By our law a wife may bar herself of dower by joining with her husband in a deed for the conveyance of the land; and the plea to that effect may be as follows:

And the said T. comes and says that the said D. her action aforesaid thereof against him ought not to have or maintain, because he says that the said A. B. in his life time, to wit, on the — day of — was seised in his demesne as of fee of the said tenements

12. Plea, in bar of dower, by joining with her husband in a conveyance of the premises.

(*o*) Supra, Ch. XIV. § 2. pl. 5.

(*p*) Story's Plead. 352.

(*q*) Co. Lit. 32.



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with the appurtenances whereof the said D. above demands her dower, and being so thereof seised he the said A. B. and the said D. then his wife by their deed of that date by them duly executed, and afterwards duly acknowledged and recorded, and here in court produced, granted, bargained, sold, conveyed and released in manner following; that is to say, the said A. B. did in and by the said deed for a valuable consideration therein expressed, grant, bargain, sell and convey the said tenements with the appurtenances to him the said T. and his heirs and assigns, to have and to hold the same to him the said T. and his heirs and assigns to his and their sole use forever; and the said D. did in and by the same deed for a valuable consideration therein expressed grant and release to him the said T. all her right of dower in and to the said tenements with the appurtenances, and did thereby lawfully bar and exclude herself from all right of dower therein: And the said T. further says that the said A. B. never was, at any time after the execution of the deed aforesaid, seised of the said tenements with the appurtenances, nor of any part thereof; and this he the said T. is ready to verify: wherefore he prays judgment if the said D. her action aforesaid thereof against him ought to have or maintain and for his costs.

The above form seems to contain all that is essential to such a plea, though some of our precedents are longer and more particular (*r*). Even if it were a mortgage, instead of an absolute conveyance, I apprehend the same form would answer. A mortgage deed conveys the whole legal estate; and if the condition has been performed, or the mortgage in any way discharged, the demandant may show it in her replication.

If the release of dower were contained in a separate deed of the wife, made after the sale by the husband, and reciting that sale as a consideration, as it may be done (*s*), the form will be varied accordingly. I presume however that such a subsequent deed by the wife, like other similar acts of *femes covert*, would not be good unless made with the assent of her husband.

As the deed in the above plea is stated to have been made to the tenant himself, I have made *profert* of it. If the tenant is the grantee of him to whom the release is

(*r*) See Story's Plead. 359, 360.

(*s*) 7 Mass. R. 20.

made, he is not required nor presumed by our laws to have the possession of the deed of release, and may therefore, I presume, plead it without profert. The demandant may reply any matter which shows that the deed was originally inoperative, or has become ineffectual.

The tenant may also plead in bar, a devise or bequest to the demandant by her husband in lieu of dower, and an acceptance by her (*t*); also a jointure made before marriage; or made after marriage, and subsequently assented to by the widow; or that her dower has already been assigned (*u*).

This last plea will in one case vary from the English forms. By our laws the Judge of Probate for the county where the estate of the husband is settled, may cause the widow's dower to be assigned to her by three freeholders appointed by him; and such assignment being duly accepted, and recorded in the Probate office, is binding on all persons interested. This authority of the Probate Court, it is presumed, would be confined to the real estate of which the husband died seised. The statutes (*x*) contemplate the settlement of the estate among the widow and heirs or devisees of the deceased; and if the jurisdiction should be extended to lands which were held by strangers in the husband's life time, it might draw in question before the Probate Court the validity and the construction of deeds, and the title to real estates, which ought to be decided according to the course of the common law.

The plea of an assignment of dower by the Probate Court may be as follows :

And the said T. comes and says, that the said D. her action aforesaid thereof against him ought not to have or maintain, be-

13. Plea, that dower has been assigned by the Judge of Probate.

(*t*) See stat. 1783, c. 24, that the provision made for her by the will shall bar her claim of dower, "unless it appears by the will plainly the testator's intention to be in addition to her dower."

(*u*) See Rast. 233. 229. 7 Mass. R. 153. *Hastings v. Dickinson & ux.*

(*x*) Stat. 1817, c. 190. § 24, 25. See also stat. 1820, c. 54, and 1783, c. 36.

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cause he says that after the decease of the said A. B. to wit, on the — day of — the Honourable J. H. Judge of Probate for the said county of S. then having jurisdiction of the settlement of the estate of the said A. B. (y) duly issued his warrant directed to J. S., J. N. and R. S., three discreet and disinterested freeholders, authorizing and requiring them to assign and set out to the said D. her dower of and in the real estate of which the said A. B. her late husband died seised; and such proceedings were thereon had, that they the said J. S., J. N. and R. S. did afterwards duly and legally assign and set out to the said D. her dower of and in the said real estate of her said late husband, and made due return of the said warrant to the said Judge of Probate; and afterwards, to wit, at a Probate Court held at B. within the said county of S. on the — day of — the said assignment of dower so made as aforesaid was duly accepted by the said Judge of Probate, and recorded in the Probate office of the same county; which said assignment of dower and decree of acceptance thereof still remain in full force, not reversed, annulled, nor altered: and the said T. further says that the said A. B. died seised of the tenements aforesaid with the appurtenances, whereof the said D. above demands her dower as aforesaid; and this he the said T. is ready to verify: wherefore he prays judgment if the said D. her action aforesaid thereof against him ought to have or maintain, and for his costs.

(y) See stat. 1817, c. 190, § 24.

## CHAPTER XVII.

*Action of Waste.*

THE common action of Waste lies for him who has an estate of inheritance, in reversion or remainder, immediately after an estate for life or years. Therefore if there be a lease to A. for life, remainder to B. for life, no action of waste can be brought against A. The action cannot be maintained by B., because he has no estate of inheritance; and the reversioner cannot bring it, because his has not the next immediate estate. But if B. dies, or surrenders his estate, the reversioner may maintain the action, for waste committed before, as well as after, the determination of that second estate. And if the lease had been to A. for life, remainder to B. for years, this intermediate estate for years would be no impediment to the action by the reversioner or remainder-man; for a recovery in such an action would not destroy the term for years (a).

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Our statute concerning dower, 1783, c. 40, prohibits the tenant in dower from committing or suffering strip or waste, "upon penalty of forfeiting the part of the estate upon which such strip or waste shall be made, and the damages assessed for waste, to him or them that have the immediate estate of *freehold*, or inheritance, in remainder or reversion, by an action of waste to be brought therefor." This apparent departure from the principles of the common law, in allowing the action to be brought by

(a) Co. Lit. 53, 54. 2 Inst. 301. The action on the case in the nature of waste is now frequently substituted for this action; and it lies in some cases where the action of waste will not lie. See 2 Saund. 252. n. 7.

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one who has not an estate of inheritance, arose perhaps inadvertently from copying in this clause the words of the first section, which provide that "the heir, or other person having the next immediate estate of freehold or inheritance," shall assign and set out the dower. It might indeed be thought reasonable by the legislature, if the widow recovered or received her dower from a tenant for life, holding under a lease from the husband, and afterwards committed waste, that this waste should not go unpunished, as it would at the common law; and that on a forfeiture of her estate, it should revert to him from whom it was taken, to hold as he had previously held it. With this view it might be proper to allow the tenant for life to recover the place wasted; but this would furnish no reason for allowing him to recover all the damages which might have been done to the inheritance. It would seem to have been a better mode, to allow the reversioner in fee to maintain the action, notwithstanding the intermediate estate for life; and to provide that upon a recovery by him, the tenant for life should be restored to his estate; or, to allow the reversioners for life and in fee to join in the action, each to recover his former estate in the land, and the damages to be apportioned between them, according to the nature of the waste done, and the relative value of their respective estates. This apportionment would perhaps be better accomplished by a court of chancery jurisdiction; but until we have such a court, it might be adjusted by a jury, either in the original action, or upon a new suit, or issue, between the two original plaintiffs.

This statute contains other proofs of having been inartificially or negligently drawn. It speaks of him who has the next immediate estate *in remainder* or reversion; whereas there cannot be a *remainder* after an estate in dower. The dower being taken out of an existing estate, by law, and not by any deed or conveyance of the parties, what is left in the hands of the former owner must be a reversion. I have not learnt that the above clause in this statute has ever received any judicial construction; and if its provisions should appear to be doubtful or in-

congruous, the subject may perhaps be thought of sufficient importance to induce the legislature to pass an explanatory act.

The statute Westminster 2, c. 22 (b), which gives an action of waste of a peculiar kind to one tenant in common or joint-tenant against another, is not in force here; our statute 1785, c. 62, having made a different provision for that case.

If a tenant in dower or by the curtesy assigns his whole estate, and the assignee commits waste, the action, if brought by the heir (to wit, of the former husband or wife) must be brought against the original tenant, and not against the assignee. In this case the reversioner proceeds as if the assignee had been merely the bailiff or servant of the tenant in dower or by the curtesy. But if the reversioner had also assigned over his reversion, and the assignee of the life estate had attorned, the latter seems to have been considered as if he held by or under an original lease for life; and for waste committed by him the action lies against himself, and not against his assignor (c). So if any lessee for life or years commits waste, and afterwards assigns his whole estate, the action for waste lies against the original tenant; and the place wasted may be recovered from the assignee, although he is not a party to the suit. But if any such assignee commits waste after the assignment, the action must be brought against him, and will not lie against the original lessee (d). It follows of course that general non-tenure is no plea in this action. But the defendant may plead special non-tenure; as for example, if he was a lessee for life, and not a tenant in dower or by the curtesy, he may plead that he assigned over all his estate, and that before that assignment there was no waste committed; or

(b) 2 Inst. 403.

(c) 2 Inst. 301, and see Reg. 72, b. that after an assignment of the reversion, "the tenant in dower becomes a tenant for term of life." Id. 73, the like rule as to tenant by the curtesy.

(d) Viner, Waste, S. U. and the books there; also 2 Inst. 302, and Thel. Dig. L. 10. c. 21. § 10, 11.

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if the defendant is an assignee, whether of a tenant in dower, tenant by the curtesy, or of a lessee for life or years, he may plead that assignment, with an averment that no waste has been committed since that time (e).

At common law there was no action of waste against lessee for life or years. The statutes of Marl. c. 24, and of Glouc. c. 5, which give the action, apply to "all such as hold by lease for life, or lives, or for years, by deed, or without deed" (f); and a lessee for life or years, after having assigned over all his estate, cannot be said to *hold* in any manner. An assignee is not liable in any case for the damages for waste committed before the assignment; but he is liable to lose the land by reason of such waste, because it produced a forfeiture of the estate of his assignor.

This writ lies either in the *tenet*, or in the *tenuit*; that is, the plaintiff in mentioning the premises says, "which the said T. *holds*, or, which he *held*," of the plaintiff. This averment or surmise has no reference to the actual holding of the land at the time of the action brought, but to the estate, or term, for which the land was held. If the estate had expired before the action brought, the writ is in the *tenuit*; for no one can then hold that estate or term, and the plaintiff recovers only his damages; but if it is still in existence, the writ is in the *tenet*; and if it is brought against the proper party, though he is not then tenant of the land, the plaintiff may recover the place wasted as well as his damages (g).

If the waste is committed by a stranger, even though he may have disseised the tenant, yet the latter is liable to the action of waste; and he has his remedy over by an action of trespass against the wrongdoer (h). So if lessee for life makes a lease for years, and the tenant for years commits waste, the action lies against the former; for he, not having parted with his whole estate, is still tenant for life (i).

(e) Bro. Waste, 22. 40 E. 3. 33.

(f) 2 Inst. 145. Id. 299.

(g) See 2 Saund. 234. n. 1, and the books there cited.

(h) Vin. Waste, K. pl. 1, 2.

(i) Ib. pl. 6. 49 E. 3. 26.

The declaration must set forth the title of the plaintiff, and show how he is entitled to the inheritance, as fully and correctly as in a writ of entry on intrusion, or any other writ in which an estate for life or years is set forth in the tenant. It must also particularly specify the quality and quantity of the waste, and the place in which it is committed ; as whether it be in the whole premises, or in any distinct part of them ; and in either case, whether it be done *sparsim*, as by cutting trees in different parts of a wood, or be in its nature total, as by prostrating an entire building. The plaintiff may recover for as much as he proves, although he should not prove the whole waste as laid (k).

As the occasions for this action seldom occur in our practice, I shall give but a few forms of the writ and declaration.

Summon T. to answer to D. in a plea of waste (l), for that the said T. did make waste, sale and destruction in a certain messuage situate in B. aforesaid, and bounded, &c. which she holds in dower of the inheritance of the said D. to the disinherison of the said D. as he saith : And whereupon the said D. saith, that whereas the said T. holds of the inheritance of him the said D. the messuage aforesaid as her dower, of the endowment of one H. formerly her husband, the father (or other ancestor) of the said D. whose heir he is, she the said T. did make waste, sale and destruction in the said messuage, that is to say, by prostrating one kitchen, parcel of the said messuage, of the value of five hundred dollars, and one chamber, also parcel of the said messuage, of the value of two hundred dollars, and by taking, carrying away and selling the timber and bricks of the said kitchen and chamber, and by suffering the roof of the said messuage to be and remain uncovered, by means whereof the beams and rafters of the said roof, and the walls of the said messuage became rotten, decayed and ruinous ; to the disinherison of the said D. and to the damage, &c.

1. Count, by reversioner against tenant in dower.

If the action is brought by an assignee of the reversion, the count will be varied as follows :

(k) 2 Saund. 235, 236, notis.

(l) See 2 Saund. 234, " to answer to the said W. C. in the said plea of waste."



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2. — by assignee of the reversion.

— which she holds for her life (m) of him the said D. by force of an assignment which one S. thereof made to him the said D. of which said S. she the said T. held the same in dower of the inheritance of the said S. to the disinherison of him the said D. as he saith: And whereupon the said D. saith, that whereas the said T. held of the inheritance of the said S. the messuage aforesaid as her dower of the endowment of one H. formerly her husband, the father of the said S. whose heir the said S. was; and afterwards, to wit, on the — day of — the said T. being so seised of the said messuage, and the reversion thereof belonging to the said S. and his heirs, he the said S. by his deed of that date duly executed, acknowledged and registered, and here in court produced, did, for a valuable consideration therein expressed, grant, sell and assign the said reversion of and in the said messuage to him the said D. and his heirs and assigns forever; she the said T. did make waste, sale and destruction in the said messuage, that is to say, by prostrating, &c.

In the ancient English forms, after stating the assignment of a reversion, it is always added, that the tenant for life attorned to the assignee; but such attornment is not required by our law, and that averment is omitted.

The action did not lie by the common law against any but a tenant in dower, tenant by the curtesy, or a guardian, and therefore when the action was brought against the assignee of either of those three persons, or against a lessee for life or years, the writ began with a brief recital of the statute, as follows:

T. was summoned to answer to D. of a plea, wherefore, whereas it is provided by the common council of our Lord the King of England that it shall not be lawful for any person to commit waste, sale or destruction in the lands, houses or gardens demised to him for the term of life or years, the said T. did make waste, sale and destruction in a certain piece of woodland, situate, &c. which he holds, &c.

It was usual also to recite the statute in an action against a tenant by the curtesy; in which case after the words, "demised to him for life or years," it was added, "or in those which are held by the law of England" (n). Lord

(m) See Reg. 72. b.

(n) See Reg. 73. b.

Coke says that this action lay at the common law against the tenant by the curtesy (*o*); and if so this recital was unnecessary in an action against him. But as the law in this particular had been formerly doubted, and this recital could not vitiate the count, it was commonly inserted. This statute having been adopted as part of our common law, the recital of it seems wholly unnecessary in our practice.

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Summon T. to answer to D. in a plea of waste, for that the said T. did make waste, sale and destruction in a certain messuage and piece of land situate, &c. which he holds as tenant thereof by the curtesy, of the inheritance of the said D. to the disinherison of him the said D. as he saith: And whereupon the said D. saith that whereas the said T. holds of the inheritance of the said D. the messuage and land aforesaid, as tenant thereof by the curtesy, after the death of W. formerly the wife of the said T. and the cousin of the said T. whose heir he is, to wit, the son of one J. A. who was the son of one S. A. who was the father of one V. who was the father of the said W. [for that the said T. and W. had issue between them a son named Richard;] he the said T. did make waste, sale and destruction, &c. (*as above in pl. 1.*)

3. — by reversioner against tenant by the curtesy.

The statement in brackets in the above count, as to the issue of the husband and wife, seems unnecessary, as it is not incumbent on the plaintiff to show a complete and indefeasible title in the defendant. It is enough that he actually holds as tenant by the curtesy. The averment is inserted in one count in *Rastel*, and omitted in another (*p*).

If the defendant holds for life or years, the count would be varied as follows:

— in a certain house and garden with the appurtenances situate, &c. which he the said D. demised to the said T. for the term of his life; (*or*, for a term of years;) to the disinherison of the said D. as he saith: And whereupon the said D. saith, that whereas he on the — day of — had demised to the said T. the said house and garden with the appurtenances for the term of his life, by force whereof the said T. was seised of the said house, &c. in his demesne as of freehold, the said T. made waste, &c. (*or*, had demised

4. — by lessor against lessee, for life, or years.

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to the said T. the said house, &c. for the term of twenty years thence next following, the said T. made waste, &c.)

If the action is brought by the assignee of the lessor, the demise may be stated as follows :

## 5. — by assignee of lessor.

—in a certain house situate, &c. which the said T. holds for his life (*or, for a term of years*) of the said D. by force of an assignment which one A. who demised the same to the said T. for the term aforesaid thereof made to him the said D. to the disinherison of the said D. as he saith : (*or, holds, &c. of the said D. as assignee of one A. who demised the same to the said T. for the term aforesaid, to the disinherison of the said D. as he saith :*) And whereupon the said D. saith that whereas the said A. was seised of the said house in his demesne as of fee, and being so thereof seised on the — day of — by his deed of that date by him duly signed, sealed and delivered (*or, by a certain indenture, &c.*) had demised the same to the said T. for the term of his life, by force whereof the said T. was seised of the said house in his demesne as of freehold ; and afterwards, to wit, on the — day of — the said T. being so seised of the said house for the term of his life, the reversion thereof belonging to the said A. and his heirs, he the said A. by his deed of that date by him duly executed, and acknowledged, and registered, and here in court produced, for a valuable consideration therein expressed, granted, sold and assigned the said reversion of and in the said house to him the said D. and his heirs and assigns forever ; he the said T. did make waste, &c. (*if the lease were for years, say, by his deed, &c. (or, by a certain indenture, &c.) had demised the same to the said T. for the term of twenty years thence next following, and afterwards, to wit, on the — day of — the said A. being seised in his demesne as of fee of and in the reversion of the said house expectant on the expiration of the term aforesaid, did by his deed of that date, &c. grant, sell and assign the said reversion to him the said D. and his heirs and assigns forever ; he the said T. did make waste, &c.*)

If the action is by the heir of the lessor, the count would be varied as follows :

## 6. — by the heir of lessor.

—in a certain messuage, &c. which one F. the father of the said D. whose heir he is, demised to the said T. for the term of his life, to the disinherison of the said D. as he saith. And whereupon the said D. saith that whereas the said F. was seised of the said messuage in his demesne as of fee, and being so thereof seised had

on the — day of — by his deed, &c. demised the same to the said T. for the term of his life, by force whereof the said T. was seised of the said messuage in his demesne as of freehold; and afterwards the said F. died seised of such his estate in the reversion of and in the said messuage, after whose death the said reversion descended to the said D. as the son and heir of the said F.; he the said T. after the death of the said F. did make waste, &c.

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Against the assignee of lessee for life or years, it would be as follows :

—in a certain messuage, &c. which the said T. holds of the said D. for the life of one S. by force of a demise of the said S. to which said S. he the said D. demised the said messuage for the same term, to the disinherison of the said D. &c.—or, which the said T. holds of the said D. for the life of one S. by force of a demise which the said S. thereof made to the said T. to which said S. he the said D. (or, one F. the father of the said D. whose heir he is) demised the said messuage for the same term, to the disinherison of the said D. &c.

7. — against lessee of tenant for life or years.

If the lease were for years, say,

—which the said T. holds of the said D. for a term of years by force of a demise which one S. thereof made to the said T. to which said S. he the said D. demised the said messuage for the same term, &c.

When the estate of the lessee for life or years has expired, the writ is in the *tenuit*, as follows :

—in a certain messuage which the said T. held for a term of years of him the said D. the son and heir of one F. who demised the same to the said T. for the same term, to the disinherison of the said D. as he saith; And whereupon, &c. (*stating the demise by F. and the descent to D. as in the preceding forms.*)

8. Count in the *tenuit*, after the determination of the particular estate.

If the original demise was for the life of another, the statement of the demise would be varied accordingly; to wit :

—which the said T. held for the life of one S. of him the said D. the son and heir of one F. who demised the same to the said T. for the same term, to the disinherison, &c.

9. The like, against tenant *pur auter vic.*

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It is sufficient if it appear in the writ and declaration that the term has expired, without using the formal words, *quas tenuit*. In 43 E. 3. 13. b. the plaintiff counted on a lease for three years, and it was objected that the writ did not say *quas tenuit*, but it was held good. Fitzherbert, in stating this case, (Briefe, 562,) says that the plaintiff counted on a lease for a term of years *which was past*; it is probable therefore that it appeared from the date of the lease that the term had expired, though it is not so stated in the Year Book (q).

The general issue in this action is, that the defendant has not made any waste; as follows:

10. Plea, general issue.

And the said T. comes and defends the wrong and injury when, &c. and says that he did not make any waste, sale or destruction in the messuage aforesaid, as the said D. in his writ and declaration aforesaid has above supposed, (or, alleged,) and of this he puts himself on the country.

In 2 Saund. 238, note 5, it is said that this plea puts the whole declaration in issue; and that therefore the plaintiff must prove his title as laid in the declaration. The only authority cited for this opinion, which seems to have been too hastily adopted by the learned editor of Saunders' Reports, is the case of Leigh v. Leigh, in Lutw. 1547. In that case there was a trial at bar, in which Lutwiche, who was of counsel for the defendant, contended that on the plea of "no waste done" the plaintiff ought to show a title to the lands in which the waste was assigned, "for this was the general issue, by which nothing was admitted." He adds that the whole court was of this opinion; but that "being informed that the evidences of the plaintiff's title were in the city, leave was given to send for them." From this statement it does not appear that the matter was much debated; and it could not have been very deliberately considered, as it occurred in the progress of a trial by jury. It is evident that the counsel for the plaintiff did not suppose that they should be required to prove his title, as they would in

(q) Vin. Waste, U. 2. pl. 2. Thel. Dig. L. 10. c. 5. § 23.

that case have taken care to have had the deeds in court; and when surprized by this call for evidence, they might have thought it easier to send for the deeds, than to undertake an argument to show that it was unnecessary to produce them. The reason assigned by Lutwiche, to wit, "that this was the general issue, by which nothing was admitted," seems to be founded on the idea, that to every action there is some one general plea or issue which traverses the whole declaration; but this is a very erroneous opinion. There is indeed in most cases a general issue which traverses and puts in issue the *most material point* of the action; but in many actions there are several distinct points or averments, all material, which cannot be put in issue by any one plea. Thus in the action of dower, the marriage, the seisin, and the death of the husband, are all equally essential to the maintenance of the action, yet there is no single plea that can put in issue more than one of them. So in all the real actions that are founded on the seisin of an ancestor, the descent to the demandant as heir is as essential as the seisin of the ancestor, yet it is not traversed by the general issue appropriate to those actions respectively.

If on the plea of "no waste done" the plaintiff had been required to prove his title to the land, there would have been no occasion for any special plea traversing that title; yet we find in the ancient books many pleas of that kind, without any intimation that such special pleading was unnecessary (r).

I am therefore inclined to think that the case in Lutwiche was erroneously decided; or, what is more probable, that it was incorrectly reported. The Reporter, who was of counsel for the defendant, might think that the court adopted his opinion of the law, when they only yielded to it so far as to allow time to send for the evidence demanded.

Under the general issue the defendant may give in evidence any thing that proves the damage complained of

(r) Coke's and Rastel's Ent. tit. Waste. Co. Lit. 356, and the books cited in Bac. Abr. Waste, L. and Vin. Waste, B. a. 3.

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to be no waste ; as, that it happened by tempest, lightning or enemies : ~~but~~ if he has any matter of justification or excuse, he must plead it ; as, that he cut timber for repairs, or wood for fuel (*s*). So if the defendant has repaired the waste before the action brought, he must plead it specially (*t*).

In this action, when founded on a demise, it is a good plea to traverse the demise (*u*) ; for if there never was such an estate for life or years in the defendant, or such a reversion or remainder in the plaintiff, the foundation of the action wholly fails. The manner of traversing the plaintiff's title to the reversion varies according to the nature of the title. If the plaintiff claims as grantee or assignee of the reversion, the defendant may plead that he has nothing in the reversion ; but if the action is brought by the lessor against the lessee, the latter cannot plead in those general terms ; but must either deny the original demise, or must show in a special plea how the plaintiff has parted with, or lost the reversion (*x*). If the demise were by indenture between the plaintiff and defendant, the latter would undoubtedly be estopped to plead *non dimisit*, or any thing equivalent to that plea. So if the defendant holds by a lease for years made to him by the plaintiff, he cannot plead *nil habuit in tenementis*, or that the plaintiff held only for his life, or held jointly with his wife in tail (*y*).

The plaintiff, if he prevails in the action, will generally recover the place wasted, and treble damages ; but if the action is in the *tenuit*, or if the term expires pending the action, he will have judgment for the damages only (*z*).

(*s*) Co. Lit. 283. 2 Saund. 238, n. 5.

(*t*) 2 Inst. 306.

(*u*) Bro. Waste, 35. 85. 87. 128.

(*x*) Co. Lit. 356.

(*y*) Fitz. Briefe, 747. Thel. Dig. L. 11. c. 44. § 6. S. C. This case is cited in Bac. Abr. Waste, L. where by misprint, or some other mistake, it is stated that the plea was held good.

(*z*) After having finished this chapter, I was surprised to find that Mr. Dane, the learned compiler of the *General Abridgment and Digest of American Law*, had expressed an opinion that the statute of Gloucester, 6 E. 1. c. 5, had not been fully adopted in

this State ; and that the only case in which the plaintiff could recover the place wasted, was in an action against a tenant in dower, by force of our statute 1783, c. 40 ; and that he could not in any case recover more than single damages (*a*). I had previously supposed that this action, as used in England at the time of the emigration of our ancestors, was brought with them as part of their common law. It was as necessary to the due administration of justice as many other parts of the English law which were adopted here ; and there is nothing in its forms, or in the mode of proceeding in it, that is inconsistent with the course of practice in our courts. The writ of entry *in casu proviso*, founded on the 7th chapter of this same statute of Gloucester, and the writ *in consimili casu* founded on the statute of Westminster, 2. (13 E. 1.) c. 24, are both of them *penal*, as well as remedial ; but I have never heard it doubted that they were both maintainable in our courts. These two, as well as the action of waste, were probably of rare occurrence, and were not fully developed, in our early practice ; but the same remark would apply to other real actions, which are now in common use with us. Indeed it may be questioned whether there are not several of the material distinctions between the various writs of entry, or between them and the writ of right, that were not much known or regarded fifty years ago by the profession in this State. I should however feel much doubt of any opinion of mine, that should appear to be opposed to that of the very learned author of this Abridgment ; but in this instance we have on the other side also authority of the highest respectability. In the case of *Carver v. Miller*, 4 Mass. Rep. 559, the late Chief Justice Parsons, speaking of a tenant in dower, says that “if through her neglect or refusal the buildings had been suffered to decay, it would have been waste, for which she would have forfeited the place wasted, and treble damages ;” and afterwards in the same case he speaks of other tenants for life as “obliged to make repairs under the penalty of forfeiting the estate, with the treble damages.” It is obvious that he considers the English law on this point, as it existed after the statute of Gloucester, to be the law of Massachusetts ; and he supposes this to be so well known and established, that he makes it a ground of argument in the case then before the court. The opinion of this most learned judge, independently of the weight it derives from his official station at the time of pronouncing it, will not be thought inferior to that of any man who ever adorned the bar or the bench of this State. In addition to his profound knowledge of the com-

(*a*) Dane's Abr. ch. 78. art. 11. 13, 14.



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mon law of England, he had had a very extensive and long experience in the courts of this country, which peculiarly qualified him to decide on a question of this kind.

This mention of Chief Justice Parsons reminds me anew of the loss which the profession have sustained from his having left unaccomplished a work on Real Actions which he at one time proposed to himself, but which his judicial duties and the state of his health compelled him to relinquish. Such a work from his pen, would have wholly superseded this humble effort of mine; but I have understood that he left only a few sheets of his projected treatise. Whilst taking this occasion to manifest the high respect and esteem which I have always entertained, in common with all others who knew the late Chief Justice, for his distinguished talents and virtues, I cannot refrain from expressing my deep sense of gratitude for his many kind and friendly offices towards myself personally. It was under his enlightened and faithful instruction that I prosecuted my professional studies. When commencing the practice, I was honoured with his countenance, and frequently assisted by his advice. His friendship for me continued uninterrupted from that time until his death; and I have always been accustomed to consider myself as indebted chiefly to his example, and his wise and friendly counsel and assistance, for whatever of professional advancement I have been able to attain.

## APPENDIX.

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### No. I.

*Præcipe quod reddat, in entry on disseisin.*

Rex, Vicecomiti Oxoniæ, salutem.

Præcipe T. quod juste et sine dilatione reddat D. duo messuagia et quinquaginta acras terræ cum pertinentiis in B. de quibus idem T. injuste et sine judicio disseisivit prædictum D. infra triginta annos jam ultimo elapsos, ut dicit. Et nisi fecerit, et si prædictus D. te fecerit securum de clamore suo proseguendo, tunc summonneas per bonos summonitores prædictum T. quod sit coram Justiciariis nostris apud Westmonasterium in octabus Sancti Martini, ostensurus quare non fecerit: et habeas ibi summonitores, et hoc breve. Teste meipso apud Westmonasterium, viginti nono die Octobris, anno regni nostri decimo.

### No. II.

*Same, cum titulo.*

—de quibus idem T. injuste et sine judicio disseisivit P. patrem prædicti D. cujus hæres ipse est, infra quinquaginta annos jam ultimo elapsos, ut dicit.

### No. III.

*Same, in the Per, Per and cui, and Post.*

—unum messuagium cum pertinentiis in B. in quod idem T. non habet ingressum nisi per S. qui illud ei dimisit, et qui inde injuste et sine judicio disseisivit prædictum D.—*vel*, disseisivit P. patrem prædicti D. &c.—*vel*, non habet ingressum nisi per R. cui S. illud dimisit, qui inde injuste, &c.—*vel*, non habet ingressum nisi per G. inde injuste et sine judicio fecit prædicto D. infra triginta annos jam ultimo elapsos, ut dicit; et unde queritur quod prædictus T. ei deforciat. Et nisi fecerit, &c.

The clause, "et unde queritur quod prædictus T. ei de-  
forceat," is inserted only when the writ is in the *post*.

## No. IV.

*Writ of Assise of Novel Disseisin.*

Rex, Vicecomiti, &c. Salutem.

Questus est nobis D. de B. armiger, quod T. de S. miles, injuste et sine iudicio disseisivit eum de libero tenemento suo in B. prædicto, post primam transfratationem Domini Henrici Regis, filii Regis Johannis, in Vasconiam: (*vel*, infra triginta annos jam ultimo elapsos:) Et ideo tibi precipimus quod si prædictus D. fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud reseisiri de catallis quæ in ipso capta fuerint, (*vel*, et catalla quæ in ipso capta fuerunt,) et ipsum tenementum cum catallis esse in pace usque ad primam assisam cum Justiciariis nostri in partes illas venerint (*vel*, usque ad certum diem quem dilecti et fideles nostri J. N. et J. F. tibi scire faciant). Et interim facias duodecim liberos et legales homines de vicineto illo videre tenementum illud, et nomina eorum imbrevari: et summoveas eos per bonos summonitores quod tunc sint coram Justiciariis nostris ad præfatam assisam, (*vel*, quod tunc sint coram præfatis J. N. et J. F. et iis quos sibi associaverint—*vel*, iis quos illis associaverimus—ad certum locum quem iidem J. N. et J. F. tibi scire faciant,) parati inde facere recognitionem. Et pone per vadia et salvos plegios prædictum T. vel ballivum suum, si ipse inventus non fuerit, quod tunc sit ibi ad audiendum illam recognitionem. Et habeas ibi summonitores, nomina plegiorum, et hoc breve. Teste meipso, &c. (a).

## No. V.

*Entry of Plaint in Assise of Novel Disseisin.*

Assisa venit recognitura si T. injuste et sine iudicio disseisivit D. de libero tenemento suo in B. post primam, &c. (*vel*, infra triginta annos jam ultimo elapsos:) Et unde idem D. per A. B. attornatum suum queritur quod disseisivit eum de uno messuagio et octo acris terræ cum pertinentiis in B. (b).

(a) Reg 196. Rast. Ent. 78. F. N. B. 177.

(b) Rast. Ent. 58. 68. Co. Ent. 60.

## No. VI.

*Plea of the general issue.*

Et prædictus T. per E. F. attornatum suum venit et dicit quod ipse nullam injuriam seu disseisinam præfato D. inde fecit; (*vel*, de prædicto tenemento fecit;) et de hoc ponit se super assisam.

Et prædictus D. similiter.

## No. VII.

*General issue pleaded by bailiff.*

Et prædictus T. non venit; sed quidam E. F. pro eo respondet tanquam ejus ballivus, et pro eo dicit quod ipse nullam injuriam seu disseisinam præfato D. de prædictis messuagio et octo acris terræ fecit; et de hoc ponit se super assisam.

Et prædictus D. similiter.

## No. VIII.

*Plea to the writ, and over to the Assise.*

Et prædictus T. non venit; sed quidam E. F. pro eo respondet tanquam ejus ballivus, et pro eo dicit quod prædictus T. non est tenens tenementorum in visu positorum et in querela prædicta specificatorum cum pertinentiis, ut de libero tenemento, nec fuit die impetrationis brevis originalis assisæ illius, scilicet, viginti quarto die Martii anno regni Domini Regis nunc primo, aut unquam postea; et hoc paratus est verificare; unde petit judicium de brevi illo, et quod breve illud cassetur. Et si, &c. tunc prædictus E. F. dicit quod prædictus T. nullam injuriam seu disseisinam præfato D. inde fecit; et de hoc ponit se super assisam.

Et prædictus D. similiter.

The clause, "Et si, &c." which seems to have been always so expressed in the pleadings, would be filled out as follows; "And if it should be found that the said T. is tenant of the tenements aforesaid with the appurtenances, as of freehold, then," &c.

## No. IX.

*Plea in bar of the Assise.*

Et prædictus T. venit et dicit quod assisa inde inter ipsum T. et præfatum D. fieri non debet, quia dicit (&c. *stating the matter in bar*) et hoc paratus est verificare; unde petit iudicium si assisa inter ipsum T. et præfatum D. in hac parte fieri debeat.

This writ was returnable into the King's Bench, or the Court of Common Pleas, if they were sitting in the county in which the lands lay; otherwise before the Justices in Eyre, or those who had a general commission as Justices of Assise in the county, or before Justices of Assise appointed by special commission. In the latter case there was a patent or commission to the persons who were appointed Justices, which was sometimes followed by writs of *Association*, and *Si non omnes*; all of which may be seen in F. N. B. 177, 178. 185. et seqq.

## No. X.

*Writ of Assise of Mortdancestor.*

Rex, Vicecomiti, &c.

Si D. fecerit te securum de clamore suo prosequendo, tunc summoneas per bonos summonitores duodecim liberos et legales homines de vicineto de B. quod sint coram Justiciariis nostris apud Westmonasterium a die Sancti Michaelis in tres septimanas (*vel*, coram dilectis et fidelibus nostris E. et F. et hiis quos ipsis associaverimus, ad certos diem et locum quos iidem E. et F. tibi scire faciant) parati sacramento recognoscere si P. pater prædicti D. (*vel*, mater, frater, soror, avunculus, vel amita, filius, vel filia G. qui fuit frater, vel soror, prædicti D.) fuit seisitus—*vel* seisita—in dominio suo ut de feodo de uno messuagio et duabus acris terræ cum pertinentiis in B., die quo obiit: Et si obiit post coronationem domini Henrici regis, filii regis Johannis: (*vel*, Et si obiit infra quinquaginta annos jam ultimo elapsos :) Et si prædictus D. propinquior hæres ejus sit. Et interim prædicta messuagium et terram videant; et nomina eorum imbrevari facias. Et summoneas per bonos summonitores T. qui prædicta messuagium et terram tenet quod

tunc sit ibi ad audiendum illam recognitionem. Et habeas ibi summonitores, et hoc breve. Teste Meipso, &c. (c).

If the tenant pleaded *in bar of the Assise*, as for example, a matter of record, or a release, or warranty, or any other bar that was out of the points of the assise, the verdict was peremptory, and the points of the writ were not inquired of : but if issue was joined on a plea in abatement, or on the counterplea of a voucher, and found for the demandant, it was still necessary for the assise to inquire of all the three points, and if they were not all found for the demandant, he could not recover. These three points, it will be remembered, were, 1st. whether the ancestor was seised of the demanded premises on the day of his death, 2dly. whether he died within the time of limitation, and 3dly. whether the demandant was his next, or nearest heir. So if the tenant was defaulted, and no issue had been joined, the same three points must be found by the assise : and it has even been held that if the tenant traversed only one of the points, yet the assise should be charged to inquire of all three (d).

It appears therefore that the forms of pleading in this action were less important than those in most others ; and accordingly I have not found in any of the books of entries any precedent of a plea to the points of the assise, and only one, of a plea in bar (e). The latter differs from other like pleas only in the beginning and conclusion of the plea ; saying, “ quod assisa prædicta inter eos esse (*vel fieri*) non debet,” &c. instead of saying, “ quod prædictus D. actionem suam prædictam inde versus ipsum T. habere seu manutene-  
nere non debet,” &c. As the action is wholly out of use I have not thought it necessary to pay any further attention to the pleadings.

(c) Reg. 224. Rast. Ent. 435. F. N. B. 195.

(d) 2 Inst. 399. 39 Ass. 13. 40 E. 3. 48. S. C. See Dyer, 311.

(e) Rast. 131.

## No. XI.

*Writs of Ayel, Besayel and Cousinage.*

Rex, Vicecomiti, &c.

Præcipe T. quod juste et sine dilatione reddat D. unum messuagium cum pertinentiis in B. de quo A. avus (*vel*, avia) prædicti D. cujus hæres ipse est, fuit seisis in dominico suo ut de feodo die quo obiit, ut dicit: Et nisi fecerit, et si prædictus D. te fecerit securum de clamore suo proseguendo, tunc summoveas per bonos summonitores prædictum T. quod sit coram Justiciariis nostris apud Westmonasterium, in octabus, &c. ostensurus quare non fecerit: Et habeas ibi summonitores et hoc breve. Teste, &c. (*f*).

The only difference in the writ of *Besayel*, and *Cousinage*, is that the ancestor is called *proavus* in the one case, and *consanguineus* in the other.

## No. XII.

*Count in Ayel.*

D. per E. F. attornatum suum petit versus T. unum messuagium cum pertinentiis in B. de quo A. avus prædicti, D. cujus hæres ipse est, fuit seisis in dominico suo ut de feodo die quo obiit, &c. Et unde dicit quod prædictus A. avus, &c. fuit seisis de messuagio prædicto cum pertinentiis in dominico suo ut de feodo et jure tempore pacis, tempore domini Regis nunc, capiendo inde explesias ad valenciam, &c. et de ipso A. descendit jus, &c. isti D. qui nunc petit, ut consanguineo et hæredi prædicti A. videlicet, filio F. filii prædicti A. et de quo, &c. (*vel*, et de ipso A. descendit jus, &c. cuidam F. ut filio et hæredi prædicti A. et de ipso F. descendit jus, &c. isti D. qui nunc petit, ut filio et hæredi prædicti F. et de quo, &c.) Et inde producit sectam (*g*).

If the count is in *Besayel*, the ancestor is called *proavus*, and the descent is traced accordingly.

(*f*) Reg. 226. F. N. B. 221.

(*g*) Rast. 28.

## No. XIII.

*Count in Cousinage.*

D. per E. F. attornatum suum petit versus T. sex acras terræ cum pertinentiis in B. de quibus C. consanguineus prædicti D. cuius hæres ipse est, fuit seistus in dominico suo ut de feodo die quo obiit, &c. Et unde dicit quod prædictus C. consanguineus, &c. fuit seistus de prædictis sex acris terræ cum pertinentiis in dominico suo ut de feodo et jure, tempore pacis, tempore domini regis nunc, capiendo inde explesias ad valenciam, &c. et de ipso C. eo quod obiit sine hærede de corpore suo exeunte, (*vel*, et de tali statu inde obiit seistus sine hærede de corpore suo exeunte, post cujus mortem) resortiebatur jus, &c. cuidam A. ut consanguineæ et hæredi prædicti C. videlicet, sorori P. patris M. matris prædicti C. et de ipsa A. descendit jus, &c. cuidam F. ut filio and hæredi prædictæ A. et de ipso F. descendit jus, &c. isti D. qui nunc petit, ut filio et hæredi prædicti F. Et de quibus, &c. (*h*).

## No. XIV.

*Bar, that the ancestor was not seised.*

Et prædictus T. venit et defendit jus suum quando, &c. et dicit [quod prædictus D. actionem suam prædictam inde versus eum habere non debet quia dicit] quod prædictus A. non fuit seistus de tenementis prædictis cum pertinentiis in dominico suo ut de feodo die quo obiit, prout prædictus D. per breve et narrationem suam prædictam supponit; et de hoc ponit se super patriam (*i*).

Et prædictus D. similiter.

The words inclosed in brackets in the above plea seem to be unnecessary, and are omitted in some of the precedents in Rastel.

By the statute Westm. 2. c. 20, it is a good plea in these three actions to say, that the demandant is not the heir of the supposed ancestor, and conclude to the country, without showing who is the heir (*k*). So the bastardy of the demandant may be pleaded, in like form as in the writs of entry on the seisin of an ancestor (*l*).

(*h*) Rast. 29.

(*i*) Rast. 28, 29.

(*k*) 2 Inst. 399.

(*l*) Rast. 29.



## No. XV.

*Writ of Nuper Obiit.*

Rex, Vicecomiti, &amp;c.

Si D. fecerit te securum de clamore suo prosequendo, tunc ~~sum-~~  
moneas per bonos summonitores T. quod sit coram Justiciariis  
nostris apud W. tali die, ostensurus quare deforciat præfato D.  
rationabilem partem suam quæ eam contingit de hæreditate quæ  
fuit P. in N. patris (*vel*, matris, *vel* alterius antecessoris) prædicta-  
rum D. et T. cujus hæredes ipsæ sunt, et qui nuper obiit, ut dici-  
tur: Et habeas ibi summonitores, et hoc breve. Teste, &c. (m).

## No. XVI.

*Count in Nuper Obiit.*

D. petit versus T. medietatem duorum messuagiorum cum perti-  
nentiis in N. ut jus et rationabilem partem suam quæ eam contingit  
de hereditate quæ fuit P. patris prædictarum D. et T. cujus hære-  
des ipsæ sunt, et qui nuper obiit, &c. Et unde eadem D. dicit quod  
prædictus P. fuit seisisus de integris tenementis prædictis cum per-  
tinentiis in dominico suo ut de feodo et jure, tempore pacis, tem-  
pore domini regis, &c. capiendo inde explesias ad valenciam, &c.  
et inde nuper obiit seisisus: Et de ipso P. descendit jus, &c. isti  
D. et prædictæ T. ut filiabus et hæridibus ipsius P: quæ quidem T.  
prædicta tenementa integra modo tenet, et rationabilem partem  
inde eidem D. deforciat, &c. Et inde producit sectam, &c. (n).

This action lies, when the ancestor dies seised of an es-  
tate in fee-simple, leaving two or more heirs, either copar-  
ceners or heirs in gavelkind, and one or more of them holds  
out the other co-heirs. If the ancestor died seised in tail,  
and one sister deforce the other, the remedy is by a writ of  
Formedon. If the ancestor had been seised in fee-simple,  
but did not die seised, the party who is deforced cannot  
maintain a *Nuper obiit*, and is driven to his writ of right *de*  
*Rationabili parte*.

(m) Reg. 226. F. N. B. 197.

(n) Rast. 440.

## No. XVII.

*Writ of Right de Rationabili parte.*

Rex, Joanni de B. salutem.

Præcipimus tibi quod sine dilatione plenum rectum teneas D. de decem acris terræ cum pertinentiis in B. quas clamat esse rationabilem partem suam quæ eum contingit de libero tenemento quod fuit P. patris (*vel*, matris, fratris, sororis, avunculi, amitæ, vel consanguinei) sui in eadem villa, et tenere de te per liberum servitium dimidii unius denarii per annum pro omni servitio; et quas T. ei deforciat: Et nisi feceris, Vicecomes Eborum faciat; ne amplius inde clamorem audiamus pro defectu recti. Teste meipso apud W. vicessimo quarto die Junii anno regni nostri quarto (o).

In this writ, which is taken from the Register, the Demandant claims *ten acres*, and not *a moiety of twenty acres*; and Fitzherbert (*p*) says that the Demandant in this action shall recover the ten acres, to hold in severalty, and not an undivided moiety of the whole. Lord Coke (*q*) seems to be of a different opinion; and thinks that the demandant must have his judgment according to his plaint; and that, as he says, is "of a moiety, and not of any thing in severalty." This question is now immaterial, as the action is wholly out of use; but the passage quoted from Lord Coke, even if his opinion is not the most correct, seems to prove that, in the plaint or count, the demandant claimed an undivided portion of the whole, and not the whole of any certain part. There is in Rast. 541 (*r*), an imperfect count, under the title "*Rationabili parte*," which is the only one that I have met with. This precedent omits the *petitio*, or statement of the demandant's claim; so that it does not appear whether he claimed a specific part, or an undivided portion. It does however set forth that the ancestor was seised "*de integris tenementis*," and traces the descent of the whole to the de-

(o) Reg. 3. F. N. B. 9.

(p) N. B. 9.

(q) 1 Inst. 167. 6 Co. 13. Morrice's case. And see Rast. 441, *Nuper Obijt*, pl. 4. the recital of the judgment.

(r) See also Rast. 221, a.

mandant and the tenant, as in the *Nuper obiit*. In this uncertainty as to the ancient course of proceeding, I have not undertaken to prepare the form of a count, and have not thought it worth while further to investigate a subject which is now of no practical importance.

This writ may be maintained, instead of the *Nuper obiit*, although the ancestor died seised. Neither of these two actions will lie against a stranger, but only between privies in blood. Against a stranger, the demandant must have brought a Mortdancestor, Ayel, or other common action adapted to his case. In our practice we make no such distinction between privies in blood and strangers; but any co-heir who is ousted may maintain the appropriate writ of entry against the co-heir who ousts him.

## No. XVIII.

*Writ of Assise of Darrein Presentment.*

Rex, Vicecomiti, &c. Salutem.

Si D. fecerit te securum de clamore suo prosequendo, tunc sumoneas per bonos summonitores duodecim liberos et legales homines de vicineto de N. quod sint coram Justiciariis nostris apud W. tali die, parati sacramento recognoscere quis advocatus tempore pacis præsenterit ultimam personam quæ mortua est ad Ecclesiam de N. quæ vacat, ut dicitur, et cujus advocacionem idem D. dicit ad se pertinere: Et interim ecclesiam illam videant; et nomina eorum imbrevari facias: Et sumoneas per bonos summonitores T. qui advocacionem illam ei deforciat quod tunc sit ibi ad audiendum illam recognitionem: Et habeas ibi summonitores et hoc breve. Teste, &c. (s).

## No. XIX.

*Plaint, in Assise of Darrein Presentment.*

Assisa venit recognitura quis advocatus tempore pacis præsenterit ultimam personam, quæ mortua est, ad ecclesiam de N. quæ vacat, et cujus advocacionem D. clamat ad se pertinere, versus T. Et unde idem D. per A. B. attornatum suum dicit quod ipsemet tempore pacis, tempore domini Regis nunc, ad eandem ecclesiam

(s) Reg. 30. F. N. B. 31.

præsentavit quendam W. P. clericum suum, qui ad præsentationem ipsius D. fuit admissus et institutus in eadem, per cujus mortem (*vel*, resignationem, &c.) eadem ecclesia modo vacat: Et petit assisam, &c. (t).

This action lies not only for a tenant in fee-simple, but for a tenant in tail, and for his issue; and it lies also for a tenant for years, or a guardian, if they have previously presented (u).

## No. XX.

*Writ of Quare Impedit.*

Rex, Vicecomiti, &c. S.

Præcipe T. quod juste, &c. permittat D. præsentare idoneam personam ad ecclesiam de B. quæ vacat, et ad suam spectat donationem, ut dicit; et unde queritur quod prædictus T. eum injuste impedit: Et nisi fecerit, et si prædictus D. te fecerit securum de clamore suo proseguendo, tunc summoneas per bonos summonitores prædictum T. quod sit coram Justiciariis nostris apud W. tali die, ostensurus quare non fecerit: et habeas ibi summonitores, et hoc breve. Teste, &c. (x).

## No. XXI.

*Count, in Quare Impedit.*

T. summonitus fuit ad respondendum D. de placito quod permittat ipsum præsentare idoneam personam ad ecclesiam de B. quæ vacat, et ad suam spectat donationem, &c. Et unde idem D. per A. B. attornatum suum dicit quod ipsemet fuit seisis de advocatione ecclesiæ prædictæ, ut de feodo et jure tempore domini regis nunc, et ad ecclesiam illam vacantem præsentavit quendam T. B. clericum suum, qui ad præsentationem suam fuit admissus et institutus in eadem, tempore pacis, tempore domini regis nunc; et postea ecclesia prædicta vacavit per privationem prædicti T. B. canonicé factam, et adhuc vacans existit; per quod ad ipsum D. ad ecclesiam

(t) Rast. 144. Co. Ent. 62.

(u) F. N. B. 31. Bro. Tailc, 24. 2 Inst. 353. et seqq. Stat. Westm. 2. c. 5.

(x) Reg. 30. F. N. B. 32.

illam ad præsens pertinet præsentare ; et prædictus T. ipsum inde injuste impedit ; unde dicit quod deterioratus est et dampnum habet ad valenciam centum librarum : Et inde producit sectam, &c. (y.)

This action will lie for tenant in fee-simple, or tenant in tail ; but not for their heirs, if the presentment falls in the life time of the ancestor ; for it is then considered as a chattel vested and severed, and goes to their executors or administrators (z). So a termor shall have this action for a presentment which falls during the term ; although he had not previously presented (a). And a purchaser may maintain the action, counting on a presentment by his feoffor (b).

This action, according to the rule in the Register, 30, a. is of a higher nature than the assise of darréin presentment, because this supposes both a possession and a right ; whereas the assise is founded solely on a possession.

#### No. XXII.

##### *Writ of Right of Advowson.*

Rex, Thomæ de M. salutem.

Præcipimus tibi quod sine dilatione plenum rectum teneas D. de advocatlone ecclesiæ de L. quam clamat pertinere ad liberum teneamentum suum quod de te tenet in L. per liberum servitium sex solidorum per annum pro omni servitio ; quam T. ei deforciat, ut dicit : et nisi feceris, Vicecomes Eborum faciat, ne amplius inde clamorem audiamus pro defectu recti. Teste, &c. (c).

Or the writ may go in the first instance to the sheriff, as in other writs of right ; and be made returnable to the Common Pleas at Westminster ; as follows :

#### No. XXIII.

Rex, Vicecomiti Eborum, Salutem.

Præcipe T. quod juste et sine dilacione reddat D. advocationem ecclesiæ de L. quam ei injuste deforciat, ut dicit. Et nisi fecerit, et si prædictus D. te fecerit securum de clamore suo proseguendo,

(y) Rast. 503, 508. (z) F. N. B. 33. p. 34. a. b. 10 Co. Rep. 135.

(a) F. N. B. 34. b. (b) 2 Inst. 356. Rast. 500. b. pl. 1.

(c) Reg. 29.

tunc summoveas per bonos summonitores prædictum T. quod sit coram Justiciariis nostris apud W. *tali die*, ostensurus quare non fecerit; et habeas ibi summonitores et hoc breve. Teste meipso apud W. primo die A. anno regni nostri quinto. Quia W. comes A. capitalis dominus feodi illius, nobis inde remisit curiam suam. (d).

## No. XXIV.

*Count, in Writ of Right of Advowson.*

D. per A. B. attornatum suum petit versus T. advocationem ecclesiæ de L. quam ei injuste deforciat, &c. Et unde dicit quod quidam A. avus ipsius D. cujus hæres ipse est, fuit seiscitus de advocatione ecclesiæ prædictæ ut de feodo et jure, tempore pacis, tempore domini regis nunc, et sic inde seiscitus existens ad eandem ecclesiam vacantem præsentavit quendam R. P. clericum suum, qui ad præsentationem ipsius A. fuit admissus, institutus et inductus in eadem, tempore pacis, tempore domini regis nunc, capiendo inde explesias ut in grossis decimis, minutis decimis, oblationibus et obventionibus, ad valenciam, &c. ut de jure ecclesiæ suæ prædictæ; et de ipso A. descendit jus, &c. isti D. qui nunc petit ut consanguineo et hæredi prædicti A. videlicet filio et hæredi C. filii et hæredis prædicti A. &c. Et quod tale sit jus sum offert, &c. (e).

This action lies only for a tenant in fee-simple. The demandant must count on his own possession, or on the possession of his ancestor; but he should allege esplees in the parson, and not in the patron; although the esplees are alleged in the patron, apparently by mistake, in one of the precedents in Rastel (f). The pleadings are substantially the same as in other writs of right; and the tenant may join the mise by the grand assise, or by battle (g).

## No. XXV.

*Writ of Juris Utrum.*

Rex, Vicecomiti, &c.

Si D. persona ecclesiæ de E. fecerit te securum de clamore suo prosequendo, tunc summoveas per bonos summonitores duodecim

(d) Reg. 29. (e) Co. Ent. 181. Rast. 103. (f) 103. b. pl. 6.

(g) F. N. B. 30. b. c. Rast. 103. pl. 4. 7.

**liberos et legales homines de vicineto de E. quod sint coram Justiciariis nostris apud W. tali die, parati sacramento recognoscere utrum unum messuagium cum pertinentiis in E. sit libera eleemosina pertiens ad ecclesiam ipsius D. de E. an laicum feodum T. Et interim messuagium illud videant; et nomina eorum imbrevari facias. Et summoneas per bonos summonitores prædictum T. quod tunc sit ibi ad audiendum illam recognitionem. Et habeas ibi summonitores, et hoc breve. Teste, &c. (h).**

If the action is brought against another parson, who claims in right of his church, the writ is varied as follows :

No. XXVI.

—utrum, &c. sit libera eleemosina pertiens ad ecclesiam ipsius D. de E. an libera eleemosina pertiens ad ecclesiam T. de S. Et interim, &c. (i).

No. XXVII.

*Count in writ of Juris Utrum.*

**Jurata venit recognitura, Utrum unum messuagium cum pertinentiis in E. sit libera eleemosina pertiens ad ecclesiam D. personæ ecclesiæ de E. an laicum feodum T. &c. Et modo hic ad hunc diem, scilicet, &c. venit tam prædictus D. per A. B. attornatum suum, quam prædictus T. per E. F. attornatum suum; et super hoc prædictus D. dicit quod quidam R. P. nuper persona ecclesiæ prædictæ, predecessor prædicti D. nunc personæ ejusdem ecclesiæ, fuit seisis de messuagio prædicto cum pertinentiis in dominico suo ut de feodo, in jure ecclesiæ prædictæ, tempore pacis, tempore domini H. nuper Regis Angliæ septimi post conquestum, capiendo inde explecias ad valenciam, &c. Et petit inde juratam, &c. (k).**

This count does not state how the predecessor lost, or parted with the possession; and such an averment seems wholly unnecessary. In some of the precedents in *Rastel* it is stated that the predecessor aliened the premises, or demised them by a lease at will; but this averment is not traversed. And even when the demandant counts on his

(h) Reg. 32.

(k) Co. Ent. 399. Rast. 419

(i) 2 Inst. 405. 407.

own seisin, he is not required to state any ouster whatever (1).

The general issue is, that the premises are the lay fee of the tenant, and not frankalmoign belonging to the church of the demandant.

This writ has been called the parson's writ of right, and it is the highest writ that he could have. It lay to recover lands and tenements of the rectory which had been aliened by the predecessor of the demandant, or of which the predecessor had been disseised. If the demandant himself had been disseised, he might have either this writ, or a writ of entry on his own seisin. It lay also against one who had intruded after the death of a parson. If an action were brought against the predecessor, and he had not prayed in aid of the patron and ordinary, and a recovery were thereupon had against him by default, or reddition, or for want of pleading, (or even by verdict, as it has been said) his successor might have this action to recover the land (m). Indeed this writ, though in form resembling an assise, was in the nature of a writ of right, and appears to have lain for any species of deforcement; and accordingly the demandant, as we have seen, was not required to aver any ouster, nor to state any thing more than his own title, as in the common writ of right.

#### No. XXVIII.

#### *Writ of Cessavit.*

Rex, Vicecomiti L. salutem.

Præcipe T. quod juste et sine dilacione reddat D. centum acras terræ cum pertinentiis in B. quas idem T. de eo tenet per certa servitia, et quæ ad ipsum D. reverti debent per formam statuti de communi consilio regni nostri Angliæ inde provisi, eo quod prædictus T. in faciendo prædicta servitia per biennium jam cessavit,

(1) Co. Ent. 400. pl. 2.

(m) F. N. B. 48. r. 49. a. b. 3 Black. Com. 253. This is probably true in all cases of a verdict in a possessory action. But if the former verdict against the predecessor had been in a writ of right, it has been thought that it would bar his successor. F. N. B. 50. d.



ut dicit. Et nisi fecerit, et si prædictus D. te fecerit securam, &c. (n) (as in other *Præcipes*. See *supra*, No. I.)

## No. XXIX.

*Same in the per, per and cui, and post.*

—centum acras terræ cum pertinentiis in B. in quas idem T. non habet ingressum nisi per S. qui illas ei dimisit, qui illas de præfato D. tenuit per certa servitia, et quæ, &c. inde provisi, eo quod prædictus T. (*vel*, prædictus S.) per biennium, &c.

Or,—non habet ingressum nisi per R. cui S. illas dimisit, qui illas de præfato D. tenuit, &c.

Or,—nisi post dimissionem quam S. qui illas de præfato D. tenuit per certa servitia, inde fecit cuidam P. et quæ ad ipsum D. reverti debent, &c. eo quod, &c. ut dicit: Et unde queritur quod prædictus T. ei deforciat. Et nisi fecerit, &c. (o).

Where two or more are mentioned in the writ as having held the land, it ought to allege by whom the cesser was (*p*). But the writ may be maintained without stating the manner of the tenant's entry, in which case the writ is in effect in the *post*; and it is said accordingly in the Register (*q*), that in the time of Edward 1st. a writ in the following form was adjudged good.

## No. XXX.

Præcipe W. de F. et G. uxori ejus, quod juste et sine dilacione reddant abbati de S. duo messuagia, &c. quæ I. de E. de eo tenuit per certa servitia, et quæ ad ipsum abbatem, &c. eo quod prædicti W. et G. in faciendo prædicta servitia, &c.

This writ lies for the heir, in which case the tenure is stated as follows:

## No. XXXI.

—quod idem T. de P. patre prædicti D. cujus hæres ipse est, tenuit per certa servitia, et quod ad ipsum D. reverti debet, &c. (r).

(n) Reg. 237. F. N. B. 208.

(o) Reg. 237. F. N. B. 208.

(p) F. N. B. 208. h.

(q) 237.

(r) Reg. 237.

But in this case the cesser must be in the time of the heir and not in the time of the ancestor (*s*); although it does not seem necessary that the heir should have been actually seised of the services (*t*).

## No. XXXII.

*Count, in writ of Cessavit.*

D. per A. B. attornatum suum petit versus T. unum messuagium, &c. quod T. de eo tenet per certa servitia, et quod ad ipsum D. reverti debet per formam statuti de communi consilio regni regis Angliæ inde provisi, eo quod prædictus T. in faciendo prædicta servitia per biennium jam cessavit, ut dicit. Et unde idem D. dicit quod prædictus T. tenet messuagium prædictum cum pertinentiis de prædicto D. per fidelitatem et redditum quinque solidorum eidem D. et hæredibus suis annuatim ad festa, &c. per equales portiones solvendorum; de quibus servitiis idem D. fuit seisitus per manus prædicti T. ut per manus veri tenentis sui, tempore pacis, tempore domini regis nunc, videlicet de prædicta fidelitate ut de feodo et jure, et de prædicto redditu in dominico suo ut de feodo et jure; prædictus tamen T. in faciendo prædicta servitia per biennium ante diem impetrationis brevis originalis ipsius D. scilicet duodecimam diem Februarii anno regni domini regis nunc decimo, jam cessavit; et quod, &c. eo quod, &c. et inde producit sectam, &c. (*u*).

When the writ is in the *per*, &c. the count will be varied accordingly; of which a precedent may be seen in Rastel, 111, b.

## No. XXXIII.

*Writ of Assise of Nuisance.*

Rex, Vicecomiti, &c.

Questus est nobis D. quod T. injuste et sine judicio arctavit (*vel*, obstruxit) quandam viam in S. in comitatu tuo, ad nocumentum liberi tenementi sui in eadem villa, post primam transfretationem domini Henrici, filii regis Johannis in Vasconiam: Et ideo tibi præcipimus quod si prædictus D. te fecerit securum de clamore suo prosequendo, tunc facias duodecim liberos et legales homines de

(*s*) 2 Inst. 402.

(*t*) Reg. 237.

(*u*) Rast. 110, 111.

vicineto illo videre viam illam et tenementum illud, et nomina eorum imbrevari; et summoveas eos per bonos summonitores quod sint coram dilectis et fidelibus nostris R. et S. et hiis quos illis associaverimus, ad certos diem et locum quos iidem R. et S. tibi scire faciant, parati inde facere recognitionem. Et pone per vadia et salvos plegios prædictum T. vel ballivum suum, si ipse inventus non fuerit, quod tunc sit ibi ad audiendum illam recognitionem. Et habeas ibi summonitores, nomina plegiorum, et hoc breve. Teste, &c. (x).

This writ will lie also for digging or filling a ditch, raising or lowering the water in a pond, erecting or throwing down a hedge or fence, or for diverting a water course (y), &c. to the nuisance of the plaintiff's freehold.

The count, or plaint, for diverting a water course may be as follows :

## No. XXXIV.

*Assisa venit recognitura si T. injuste et sine iudicio divertit cursum cujusdam aquæ in S. ad nocumentum liberi tenementi D. in N. In comitatu prædicto, infra triginta annos jam ultimos elapsos : Et unde idem D. per A. B. attornatum suum queritur, quod ubi idem D. habeat quandam fontem in villa de S. currentem usque ad rotam molendini ipsius D. in N. ; prædictus T. divertit cursum aquæ illius usque ad molendinum cujusdam J. ; ante quam quidem diversionem prædictum molendinum prædicti D. molere potuit quibuslibet die et nocte decem quarteria frumenti et decem quarteria brasii, et modo molere non potest quibuslibet die et nocte nisi quatuor quarteria frumenti et quatuor quarteria brasii, (vel, et modo aliquid molere non potest) ad nocumentum, &c. Et inde petit assisam, &c. (z).*

## No. XXXV.

The general issue seems to be as follows :

Et prædictus T. per E. F. attornatum venit and dicit quod ipse non divertit cursum aquæ prædictæ ad nocumentum liberi tenemen-

(x) Reg. 197, 198. F. N. B. 183. Co. Ent. 92.

(y) As to obstructing or straitening a water course, see Dyer, 248. pl. 80. 48 Ass. 4. 48 E. 3. 27. S. C.

(z) Rast. 441. Co. Ent. 92.

ti ipsius D. modo et forma prout idem D. superius versus eum queritur; et de hoc ponit se super assisam:

Et prædictus D. similiter (a).

The precedent in Coke from which the above plea is taken, begins with saying "that the assise ought not to be taken," because he says that he did not divert the water, &c.; but that clause was probably inserted from inattention. That is the proper beginning of a plea *in bar of the assise*; but it is inconsistent with the above plea, in which the defendant puts himself on the assise.

If the verdict is found for the plaintiff, he has judgment for his damages, assessed by the jury, and also for the removal of the nuisance at the expense of the defendant, as follows:

No. XXXVI.

Ideo consideratum est quod nocumentum prædictum omnino amoveatur; et quod aqua prædicta in prædictum antiquam et rectum cursum suum ad molendinum prædictum ipsius D. ad custagia prædicti T. reducatur; et quod prædictus D. recuperet versus prædictum T. dampna sua prædicta ad decem libras, &c.

This writ, being to the nuisance of the plaintiff's *freehold*, will not lie for a lessee for years, whose only remedy is an action on the case. So it will not lie for a way in gross, nor for a way to a church, (unless in the latter case the plaintiff has the way *ratione tenuræ*) because the way must be annexed or appendant to some freehold of the plaintiff.

By the common law this action lay only against him who erected, or levied, the nuisance; and if he had aliened the land, or if it had descended to another, the injured party was driven to his *Quod permittat*, which was a writ of right in its nature. The statute of Westminster 2d. c. 24, provides that in case of such an alienation, or other transfer, the action may be maintained against the wrongdoer, and his alienee, jointly; or against his heir (b).

(a) Co. Ent. 92.

(b) 2 Inst. 404, seqq.

## No. XXXVII.

*Writ of Quod permittat.*

Rex, Vicecomiti, &c.

Præcipe T. quod juste et sine dilatione permittat D. prosternere quandam domum (*vel*, quendam murum, *vel* quandam sepem, &c.) in S. quam P. pater prædicti T. cujus hæres ipse est, injuste et sine iudicii levavit ad nocumentum liberi tenementi sui (*vel*, liberi tenementi R. patris, *vel*, *alterius antecessoris*, prædicti D. cujus hæres ipse est) in eadem villa, post primam transfrætationem, &c. Et nisi fecerit, et si prædictus D. te fecerit securum, &c. (c). (*as in other Præcipes.*)

This writ, when brought to abate a nuisance, seems to have been sometimes called "*Quod permittat prosternere*," to distinguish it from other writs of *quod permittat*, which lay for common of pasture, turbary, piscary, or other incorporeal hereditaments (d); but the writ had not always the word *prosternere*, even when brought to remove a nuisance. It varied according to the nature of the nuisance which was the subject of complaint; as, for example:

—quod juste, &c. permittat D. reducere cursum cujusdam aquæ in I. in rectum et antiquam cursum suum, quem P. pater prædicti T. cujus hæres ipse est, divertit ad nocumentum, &c.—*vel*, permittat D. deobstruere, *vel*, dearcare, quandam viam in N. quam P. pater, &c. obstruxit, *vel*, arctavit, ad nocumentum, &c.

## No. XXXVIII.

*Count in the writ of Quod permittat.*

T. summonitus fuit ad respondendum D. de placito quod permittat ipsum habere quoddam chiminum ultra terram ipsius T. quod habere debet et solet: Et unde idem D. per A. B. attornatum suum dicit, quod cum ipse seisitus existat de uno messuagio cum pertinentiis in S. ad quod ipse habere debet et solet quoddam chiminum a regia via ibidem ultra terram ipsius T. videlicet duas acras pasturæ vocatæ Rayles lands, ad carandum et recarandum

(c) Reg. 199. F. N. B. 124.

(d) F. N. B. 122.

blada, fœnum, et fimum ipsius D. cum carectis et aliis carriagiis suis, et ad fugandum omnimoda averia sua ultra prædictam terram prædicti T. per totum annum quodcumque et quotiescunque eidem D. placuerit, pertinens; de quo quidem chimino idem D. fuit seisisus in dominico suo ut de feodo et jure, tempore pacis, tempore Domini regis nunc, capiendo inde explesias ad valentiam, &c. usque sex annos proximos ante diem impetrationis brevis originalis ipsius D. scilicet decimum diem O. anno, &c. quod prædictus T. ipsum D. chiminum prædictum habere non permisit, nec adhuc permittit; ad damnum ipsius D. decem librarum: Et inde producit sectam, &c. (e).

When the plaintiff counts on a way by prescription, it is a good plea to traverse the prescriptive right, and conclude to the country (f); and I presume that the title in the above count might be traversed as follows:

## No. XXXIX.

*General issue.*

Et prædictus T. per C. D. attornatum suum venit et defendit vim et injuriam quando, &c. et dicit quod prædictus D. actionem suam prædictam inde versus eum habere non debet, quia dicit quod prædictus D. non debet nec solet habere chiminum prædictum ultra prædictam terram prædicti T. prout prædictus D. per breve et narrationem suam prædictam suporiis supponit; et de hoc ponit se super patriam.

It seems also that the defendant might deny the supposed obstruction; and this might be called the general issue, as properly as the preceding plea. Neither of them answers the whole declaration; but each of them traverses a material averment, without which the action could not be maintained.

## No. XL.

*Another General issue.*

Et prædictus T. per, &c. quia dicit quod ipse non impedivit prædictum D. habere chiminum prædictum ultra prædictam terram ipsius T. prout ipse prædictus D. per breve et narrationem suam

(e) Rast. 538. Co. Ent. 526.

(f) Rast. 538. Co. Ent. 526.

prædictam superius versus eum narravit; et de hoc ponit se super patriam.

This writ lay at the common law against him who first erected or committed the nuisance, or against his heir or alienee; but in the two latter cases it would not lie without a previous request to the heir or alienee to remove or reform the nuisance; which request was not necessary when the action was brought against the original wrongdoer (*g*). The judgment, if for the plaintiff, was for a removal of the nuisance, as well as for damages.

These two last actions do not appear to have been adopted into our law; and the only remedy for a nuisance on a private way in use with us has been an action on the case. There seems to be no difficulty in adapting the *Quod permittat* to our practice, without any greater changes than we have made in many other of the ancient writs; and it would certainly furnish a much more effectual and appropriate remedy than the action on the case (*h*). The introduction of the *Quod permittat* does not seem to require a greater exercise of power in our judicial courts, than the first use of the writ of right, and of various writs of entry. This writ is found with the others in the ancient code, which is the basis of our laws; it is equally adapted to our institutions, and not inconsistent with our general system of jurisprudence. But if there should be any doubt of the power of the judicial courts in this respect, it seems to be a case worthy of the interference of the legislature.

#### No. XLI.

##### *Writ Ex gravi querela.*

Rex, Majori et Vicecomitibus Londonii, Salutem.

Ex gravi querela D. filii P. accepimus, quod cum secundum consuetudinem in eadem civitate hactenus obtentam et approbatam liceat unicuique civi ejusdem civitatis tenementa sua in eadem civitate, in testamento suo in ultima voluntate sua, tanquam catalla sua, legare cuicumque voluerit; ac G. quondam civis civitatis prædictæ, in testamento suo in ultima voluntate sua, unum messuagium

(*g*) 5 Co. 101. Penruddock's case.

(*h*) See 3 Bla. Com. 220.

cum pertinentiis in eadem civitate existens, P. et hæredibus suis legasset; T. de L. messuagium prædictum præfato D. filio & hæredi prædicti P. deforciat minus juste, in ipsius D. dispendium non modicum et gravamen, et contra voluntatem testatoris prædicti, ac contra consuetudinem prædictam. Et quia eidem D. injuriari nolumus in hac parte, vobis mandamus quod vocatis coram vobis partibus prædictis, auditisque hinc inde eorum rationibus, inspectoque tenore testamenti prædicti, eidem D. plenam at celerem justitiam inde fieri facias, prout de jure et secundum consuetudinem prædictam, fuerit faciendum, et hactenus in casu consimili ibidem fieri consuerit, (*vel*, eidem D. in hac parte fieri faciatis debitum et festinum justitiæ complementum) &c. Teste, &c. (i).

This writ, it will be observed, is merely a commission or precept to the magistrates of the city or borough in which the land lies, and contains no summons or other process to the party against whom the action is brought. The court thereupon awarded a writ against the tenant of the land, in the nature of a *Præcipe quod reddat*; and on his appearance, the demandant produced the will, and counted on it, alleging seisin in the testator, and the devise to himself. The process might vary, according to the usage of different cities, and places, but the course seems to have been substantially the same in all. I have not met with any precedent of the *Præcipe*, or of the count or other pleadings. As the action was founded on the custom of the place where the land lay, and did not depend on the common law, the forms of the pleadings are not contained in the books of entries. They were no doubt substantially the same as in the common writs on the seisin of an ancestor; substituting the testator for the ancestor, and alleging a devise, instead of a descent.

When the devisee in tail, or for life, had been once seised by force of the devise, the heir in tail, or the remainderman, might maintain a formedon; and such actions have been maintained in our courts (*k*). But if the devisor had been disseised, or if after his death a stranger had entered and deforced the devisee, the latter had no remedy but by

(i) Reg. 244. F. N. B. 198.

(k) F. N. B. 200. And see numerous precedents of such actions in the books of entries. 4 Mass. Rep. 64. 5 Mass. Rep. 438.



entry ; and if his right of entry were in any manner lost, he could not recover the land (*l*). After all freehold lands were made devisable in England, by force of the statutes of Henry 8, and Charles 2, it might have been expected that actions would have been provided for devisees, like the writs of entry and writs of right for heirs ; and probably it would have been so, if the latter actions had continued in common use (*m*). But the action of ejectment, having nearly superseded the old real actions in the case of heirs, was found equally applicable to the case of a devisee, unless when the right of entry was lost ; and this probably did not occur often enough to make the people to feel the want of another remedy. As the ejectment is not in use with us, and we have retained the real actions for heirs, there seems to be no reason why the Legislature should not provide a like remedy for devisees, for whom those actions are equally convenient and necessary.

## No. XLII.

*Writ of Quod ei deforceat.*

Rex, Vicecomiti, &c.

Præcipe A. quod juste et sine dilatione reddat B. quæ fuit uxor V. unum messuagium cum pertinentiis in N. quod clamat esse rationabilem dotem suam, (*vel*, de rationabili dote sua,) et quod idem A. ei deforceat, ut dicit, &c. (*n*).

If the action is brought by one who was tenant by the curtesy, the writ is varied as follows :

—quod clamat tenere per legem Angliæ, et quod idem A. &c.

For a lessee for life, it is,

—quod clamat tenere ad terminum vitæ suæ, &c.

And for a tenant in tail,

(*l*) See 1 H. Blacks. 1. 4 Mass. Rep. 64.

(*m*) See Romilly v. James, 6 Taunt. 263.

(*n*) Reg. 171. 2 Inst. 349.

—quod clamat tenere sibi et hæredibus suis de corpore suo legitime procreatis, et quod prædictus A. ei deforceat, &c.

This writ is given by the stat. Westm. 2. c. 4 (o); and lies for a tenant in tail, tenant in dower, by the curtesy, or for life, who should have lost their lands by default in a *præcipe quod reddat* brought against them respectively. It was intended to supply the want of a writ of right, which would lie for those only who claimed a fee-simple.

In the count, the demandant merely states that he was seised in tail, or for life, &c. and alleges esplees in himself, and a deforcement by the present tenant; without setting forth the gift or demise by which he holds (p), and without any notice of the former record, or of the manner in which the tenant entered. The action lies against the heir or alienee of the former recoveror, as well against the recoveror himself.

## No. XLIII.

*Count in Quod ei deforceat.*

W. de H. pætit versus J. C. unum messuagium cum pertinentiis in H. quod clamat tenere ad terminum vitæ suæ, et quod prædictus J. ei deforceat, &c.: Et unde dicit quod ipsemet fuit seisitus de prædicto messuagio cum pertinentiis in dominico suo ut de libero tenemento, tempore pacis, tempore domini regis nunc, capiendo inde expleas ad valentiam, &c. et inde producit sectam (q).

In the two counts cited in the note, it is said that the tenant "*injuste* deforceat" the present demandant; and the same expression is used in some of the writs in the Register (r). But this word is not introduced in any of the forms prescribed in the abovementioned stat. Westm. 2; and it is expressly stated in the Register, in the page last cited, and also in 2 Inst. 353, that it should not be used. The tenant is supposed to have entered by force of a judgment in his favor, and not *injuste*, or *sine judicio*.

(o) 2 Inst. 347. F. N. B. 155.

(p) 2 Inst. 351. Rast. Ent. 537. But see Co. Ent. 525, where a gift for life is set forth in the count.

(q) Rast. Ent. 537. Co. Ent. 525. (r) 171.

The object of this suit is to revive the former action, and to try the title on which the former demandant relied, and on which he then counted. The tenant in this suit is not indeed required to stand upon the title of the former judgment, but may plead some other bar; in which case the former action is not revived. But the tenant may set forth the former recovery, and conclude that he is ready to maintain his right and title as therein set forth; whereupon the former action is revived, and the tenant in the present action becomes actor; and the present demandant may vouch, or plead any matter in bar of the former action, as if he had originally appeared and pleaded in that suit (*s*).

## No. XLIV.

*Plea, setting forth the former recovery.*

Et prædictus J. per E. C. attornatum suum venit et defendit jus suum, quando, &c. et dicit quod prædictus W. actionem suam prædictam versus cum habere non debet, quia dicit quod ipse alias, scilicet primo die Octobris anno domini regis, &c. impetravit et prosecutus fuit quoddam breve ipsius domini regis in Cancellaria sua apud Westm., &c. de forma donationis in descendere (*vel*, de consanguinitate, *vel*, de ingressu super disseisinam, &c.) versus prædictum W. ad tunc tenentem de prædictis tenementis cum pertinentiis jam petitis, ut de libero tenemento, Vicecomiti in comitatu L. directum, et coram tunc Justiciariis, &c. retornabile, allegando tunc et supponendo per prædictum breve de forma donationis prædicta quod quidam J. D. dedisset tenementa prædicta cum pertinentiis quibusdam A. C. et M. uxori ejus, et heredibus de corporibus eorum legitime procreatis, et quæ post mortem prædictorum A. et M. præfato J. C. filia et hæredi ipsorum A. et M. descendere deberent per formam donationis prædictæ; per quod quidem breve, dominus rex tunc vicecomiti ejusdem comitatus mandavit quod si prædictus J. C. fecisset ipsum vicecomitem securum, &c. tunc summoneret, &c. prædictum W. quod esset coram tunc justiciariis, &c. ad respondendum, &c. Ad quam quidem quindenam Paschæ, &c. (*setting forth the appearance of J. C. the then demandant at the return-day, the return of the writ by the sheriff, and the whole proceedings until the final default of W. the former tenant, and the judgment*

*thereon for the said J. C.)* per quod idem J. C. intravit in eadem tenementa cum pertinentiis, et fuit inde seisitus in dominico suo ut de feodo talliato per formam donationis prædictæ; et idem J. C. dicit quod ipse paratus est ad manutenendum jus et titulum suum prædictum per donum prædictum, &c. et hoc paratus est verificare; unde petit judicium si prædictus W. actionem suam prædictam versus eum habere debeat, &c.

## No. XLV.

*Replication to the above plea, by non dedit.*

Et prædictus W. dicit quod ipse per aliqua præallegata ab actione sua prædicta habenda præcludi non debet, nec prædictus J. C. nunc tenens jus et titulum suum prædictum per donum prædictum manutenere debet, quia dicit quod prædictus J. D. non dedit tenementa prædicta cum pertinentiis prædicto A. C. et M. uxori ejus, et hæredibus de corporibus eorum legitime procreatis, prout idem J. C. superius allegavit; et hoc petit quod inquiratur per patriam.

Et prædictus J. C. similiter.

The above forms are taken chiefly from the precedents in Rastel, 537. There is only one precedent of this writ in Coke's Entries, (525) and in that, the present tenant, after saying that "he is ready to maintain his right and title by the said gift," proceeds to set forth the gift specially, as he would do in a count in formedon. The title is not thus set forth in either of the precedents in Rastel, nor in the one in Herne, 573; (641;) and these are the only ones that I have seen. All that seems to be necessary is, that the right and title of the original demandant should be clearly stated, so that it may be traversed, or confessed and avoided, as it might have been in the original action, if the present demandant had then appeared and made his defence.

This writ will not lie after a judgment on *nil dicit*, confession, or on verdict, but only after a judgment on default (*t*). If a tenant in tail should die after such a recovery against him, the heir in tail cannot maintain this action; because he has an adequate remedy by a formedon in descender, which is his writ of right.

(*t*) 2 Inst. 351. Co. Lit. 355, and note 310. Cro. El. 263.



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